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United States
Circuit Court of Appeals
For the Ninth Circuit.

COLUMBIA RIVER PACKERS ASSOCIATION (a corporation),

Appellant,

vs.

H. S. McGOWAN, ERICK LINDSTROM and **J. P. COYLE,**

Appellees.

BRIEF FOR APPELLANT.

Appeal from the United States District Court for the Western District of Washington. Southern Division.

Hon. GEORGE DONWORTH, Judge.
Hon. EDWARD E. CUSHMAN, Judge

G. C. FULTON, Astoria, Oregon, Solicitor for Appellant.
DORR & HADLEY, Seattle, Wash.
WELSH & WELSH, South Bend, Wash. } **Solicitors for Appellees.**

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STATEMENT OF THE CASE.

The appellant, plaintiff in the court below, instituted this suit for the purpose of enjoining the appellees, defendants in the court below, from placing and maintaining any fixed structures or obstructions in the waters of the Columbia River in front of that portion of Sand Island, in the State of Oregon, known and designated as "Sites numbered 2 and 3" between the line of ordinary low water and the line of navigability of said river.

This suit was instituted prior to the decision of the Supreme Court of the United States in the case of State of Washington v. State of Oregon, decided November 16, 1908. 29 Sup. Ct. Rep., 47, 631.

As an historical fact, supported also by the evidence in this case, the State of Washington, at the institution of this suit, was and had been for many years prior thereto exercising exclusive jurisdiction over the fishing industry in and upon and around Sand Island in the Columbia River. This is the only island in that vicinity by that name. The officials of the State of Washington exacted from all persons operating fishing appliances in that vicinity and north of the channel of the river south thereof, licenses, and prohibited operating any fishing appliance on Sand Island, or between it and the channel of said river south thereof, unless such person or persons should have first obtained a fishing license from the State of Washington, claiming that the boundary line of the State of Washington was at the middle of the channel of said river lying immediately south of Sand Island.

Sand Island was reserved from sale for military purposes by virtue of a proclamation issued by President Lincoln, August 29, 1863, (plaintiff's Exhibit "A") and has since been owned in fee by the United States. On October 21, 1864, (special laws of Oregon, 1864) the State of Oregon, by a special act, granted to the United States all the tidelands surrounding and adjacent thereto and bordering thereon, and said United States still is, and ever since has been, the owner of such tidelands.

Prior to the year 1905, the entire south shore of Sand Island had been employed during each fishing season by various fishermen exclusively for the pur-

pose of hauling seines in front thereof, and landing same. It had never been used or employed for any other purpose. There seems to have been some mutual understanding between the fishermen, whereby they recognized locations which had been selected, and the front thereof cleared for seining purposes, the United States Government not seeing fit to interfere with the seining thereon.

As we have stated, however, the entire south shore had ever been used exclusively for seining purposes. No set nets had ever been attempted.

In the year 1905, the Secretary of War, pursuant to the act of July 28, 1892 (United States Compiled Statutes 1901, pages 25-29-30), caused said island to be surveyed and subdivided into tracts, which it called "sites," which sites were numbered numerically, beginning at the west as sites 1, 2, 3, 4, and 5, for identification purposes. (See map attached Plff. Exhibit E pg. 722). These sites were all on the south shore, monuments were erected on the land establishing the corners to each. The Secretary of War then (1905) advertised that bids would be received for the leasing of such sites on a date certain. The appellant and appellee H. S. McGowan were rival bidders. The appellee H. S. McGowan was the best bidder for sites 2 and 3 and accordingly received a lease therefore for three years, beginning in March, 1905. McGowan occupied these sites under such lease during the fishing seasons for the years 1905, 1906 and 1907, without molestation from any one, but he employed the same exclusive-

ly in seine fishing. He operated no set nets thereon.

At the beginning of the year 1908, the secretary of War again advertised for bids for these sites, and the appellee H. S. McGowan and appellant were again rival bidders, but this time the appellant was the best bidder for said sites 2 and 3 and received a lease from the United States therefor. (Plaintiff's Exhibit "E").

This lease describes the premises leased as sites 2 and 3, accordingly as shown on maps attached to the lease, together with all "easements and appurtenances thereto belonging." The United States owned, of course, not only the highlands but also the tidelands. The map attached shows that sites 2 and 3 included the frontage to Sand Island. This, taken with the fact that such premises were valuable only for seining purposes and had never been used for any other purpose is conclusive that it was the intention of the government to grant to the appellant all of the tidelands, easements and appurtenances thereto. Of course, the other sites were leased to and occupied and fished by successful bidders during this entire controversy.

Appellant having been the successful bidder, armed with this lease from the government, in the early part of June, 1908, made very extensive preparations to operate seines on said two sites and frontage thereto. It employed a large number of men, horses, seines, skiffs, paraphernalia and power boats with which to operate its seines at said points, and sent them down on the said grounds. Upon

their arrival, it was discovered that the appellees had placed in the waters immediately fronting upon said sites 2 and 3, between the line of ordinary low water and the line of navigability, and, in fact, from one to two feet of water at low tide, a large number of buoys. These buoys were large timbers attached to steel cables, which in turn were attached to large heavy rock buoys sunk into the bed of the river, rendering it impossible to navigate a seine and also impossible to haul seines from the waters onto the said shore, or to land same from the shore of said sites. These buoys had numbers painted on them, indicating that appellees had undertaken to locate the ground as a set net location under the laws of Washington.

In any event, it was impossible for appellant to operate its seines, and they entirely destroyed the free ingress to and egress from the shore of said sites. The appellant thereupon removed said obstructions with considerable expense, and was proceeding to operate its seines when the appellees replaced them. They were again removed, and appellees again replaced them. Thereupon this suit was instituted.

As we have stated, the suit was instituted before the Supreme Court of the United States handed down its decision in the suit brought by the State of Washington v. State of Oregon to establish the boundary line between Washington and Oregon in the vicinity of Sand Island.

All of the licenses having been issued by the

State of Washington, the officials refusing to recognize any licenses from Oregon, the plaintiff was practically forced to begin its suit in the then United States Circuit Court for Washington, and in its bill of complaint filed therein, it alleged that said Sand Island was within the territorial jurisdiction of the State of Washington. The suit was instituted in good faith, the appellant at that time believing Sand Island to be in the state of Washington.

Immediately, however, upon the decision of the Supreme Court of the United States, in the case of the State of Washington v. State of Oregon, being published, the appellant on June 4, 1909 by proper proceedings, citing the historical facts above mentioned, suggested to the court below the fact that Sand Island and the premises in controversy were not within the territorial boundaries, nor within the jurisdiction of such court, and asked the court to dismiss this suit without prejudice, so that the appellant could prosecute its action in the courts of Oregon. The lower court, however, held that although Sand Island was in Oregon, and although appellant had been honestly mistaken as to the territorial boundaries of Washington, yet held it had jurisdiction in the premises and refused to dismiss the action. After the lower court had announced its opinion in this regard, the appellant obtained a rule authorizing it to file a supplemental complaint. This supplemental complaint was accordingly filed September 10th, 1910. (page 149. T. R.) wherein it alleged the true facts, namely, that Sand Island was

not within the teritorial boundaries of the State of Washington, but, on the contrary, was within the territorial boundaries and under the exclusive jurisdiction of the State of Oregon, and alleged facts hereinbefore suggested, namely, that at the time the suit was brought, the territory was claimed by Washington and it was believed that Sand Island was in Washington, and suggested that the lower court was without jurisdiction, and asked for a dismissal of the suit. This request was also denied.

The appellees H. S. McGowan, Erick Lindstrom and J. P. Coyle, answered separately: each filed a cross bill, in which it is alleged that the appellees had acquired from the Fish Commissioner of the State of Washington separate licenses to operate set nets in the Columbia River, H. S. McGowan 2 licenses, Erick Lindstrom 3, and Coyle 3, and that pursuant to such licenses, they had located the buoys and obstructions complained of in appellant's complaint as and for eight set net locations for the purpose of operating eight set nets for taking salmon fish in the Columbia River, and that under the laws of the State of Washington they had the right to make such set net locations in any water in the Columbia River, and each alleged that by reason of the injunction, such set nets were not operated, and if they had been operated, large profits would have been derived from the catch of fish taken thereby, and damages were claimed against the appellant upon that ground.

It will be observed that the appellant in its

complaint was operating its seines by virtue of a license issued to it by the Fish Commissioner of the State of Washington.

It is also a matter of very great importance that the entire defense interposed by the appellees and the entire cause of action of each of the apellees against the appellant is based entirely upon 8 set net locations located under the laws of the State of Washington, and by virtue of 8 licenses issued by the Fish Commissioner of the State of Washington, and not pursuant to the laws of Oregon, or by virtue of any license issued by the Oregon authorities.

There are a number of propositions involved in this case which necessarily must be conceded and as to which there can possibly be no controversy. These may be stated substantially as follows:

FIRST: That Sand Island described in the pleadings, which includes sites number 2 and 3, is, and at and during all the times involved herein was, owned in fee by the United States, it having been reserved from sale for military purposes by proclamation issued by President Lincoln August 29, 1863. (Plaintiff's Exhibit "A".)

SECOND: That such island is and was at the institution of this suit entirely beyond the territorial boundaries and jurisdiction of the State of Washington, and exclusively within the territorial boundaries and jurisdiction of the State of Oregon. State of Washington v. State of Oregon, 29 Sup. Ct. Rep. 47, 631.

THIRD: That on October 21, 1864, the State of Oregon by a special act granted to the United States all the tidelands surrounding, adjacent and contiguous to Sand Island, and the United States is and has been ever since the owner in fee of such tidelands.

FOURTH: That on May 1, 1908, the Secretary of War, pursuant to the provisions of the act of Congress of July 28, 1892 (United States Compiled Statutes 1901, pages 25-29-30,) duly leased to appellant, an Oregon corporation but duly licensed to transact business in Washington, that portion of Sand Island known and designated as "Sites numbered 2 and 3." That these sites include not only the highlands but the tidelands as well, the lease reading "together with all the rights, easements and appurtenances thereto belonging." (Plaintiff's Exhibit "E".)

FIFTH: It must also be conceded that the Secretary of War had the authority to execute such lease, and that the same is a valid lease and vested in appellant all of the property rights belonging to the United States in the premises leased, and that by this lease, the appellant was placed in possession of all the rights, privileges and easements belonging to the United States.

SIXTH: It must also be conceded (it being the contention of both parties) that the only value attached to these rights is the right to land seines thereon, which includes the landing of boats and

vessels, and it is also conceded that the appellant paid the United States as rental therefor the sum of $5,750.00 per annum.

SEVENTH: It must also be conceded, at least it certainly cannot be successfully denied, that the appellant for the purposes of this case is the owner of said two sites, together with all easements, rights and appurtenances thereunto belonging.

EIGHTH: It also is conceded that neither of the appellees has, or claims to have, any right, title, interest or estate of, in or to any part or portion of either of said sites, or to any easement, right or appurtenant thereto, or to any littoral or riparian rights in the frontage thereof.

NINTH: It is also conceded that appellant intended to use and employ the said shores to its said sites during the fishing season of each year during the term of its said lease in landing seines and boats and water crafts, and hauling seines in the waters of said river by means of boats and vessels, and that it could not do so, if appellees were permitted to maintain the structures complained of, and that these structures were between the line of ordinary low water and the line of navigability of the Columbia River.

TENTH: It is also conceded that the appellees, without any license or authority from the United States or appellant, but against the protest of appellant, placed in the waters of said river in front of said sites and between the line of low water and

the line of navigability thereof certain fixed structures, permanent in their nature, and such as to prevent appellant from landing its seines on said shore, thereby depriving plaintiff from operating and landing its seines, boats and vessels, as well as from hauling its seines from the shores into the water.

In this connection, it is well to observe that appellees base their right to deprive appellant of all ingress to and egress from the shores to these sites, deprive it of all right to land its boats and vessel on such shore, deprive it of the right to place its seines in the waters from such shores and to haul from the waters onto such shores its seines and vessels, solely upon the ground that they have a license issued by the Fish Commissioner of the State of Washington to operate certain set nets, and, as a corollary to this proposition that a license issued by the Fish Commissioner of the State of Washington to operate a fixed appliance is a license to the holder to construct and maintain any fixed appliance in the waters of **Oregon** that he may see fit, which can be used for the purpose of catching fish, in front of any premises he may desire, or at any point he may desire, so long as it is below the line of low water, without regard to whether it entirely deprives a shore owner of ingress to and egress from his shore. In other words, that the owner of tidelands in Oregon has no right of ingress to or egress from his premises to the line of navigability, which the owner of a fishing license issued by the Fish Commissioner of the State of Washington is bound to respect. Indeed,

such was the extraordinary doctrine announced by the court below. It was further held that under the laws of the State of Oregon, the owner of tidelands on the Columbia River has not the free and uninterrupted right of ingress to and egress from his premises to the navigable waters of the river. This doctrine is absolutely at variance with the decisions and holdings of the courts of Oregon, and is without support in any jurisdiction.

An attempt has been made by appellees to thrust into this case the proposition that appellant is attempting by this suit to establish in it an exclusive right of fishery in front of these sites in question. This is not the case—no such issue is presented. This proposition is not in this case directly or indirectly. Appellant is not seeking to prevent appellees from fishing in the waters of the Columbia River opposite these sites, and no injunction is asked enjoining them from fishing there. The sole object of this suit is to enjoin appellees from erecting or maintaining any fixed structure or fixed appliance in front of said premises which will prevent appellant from ingress to and egress from its premises. That is all there is to this case. The appellant has no objection whatever to the appellees fishing in front of said premises, but it does object to them building or maintaining fixed structures in front thereof, or placing obstructions in the bed of the river which will interfere with it in its right to draw seines from the water onto its own land. The appellees themselves are the ones that

claim this exclusive right of fishery. The appellees claim that they can occupy the entire water frontage of a tideland owner in Oregon with structures for the purpose of taking fish that cannot be interfered with by anybody. And, by some species of legerdermain, the appellees succeeded in instilling into the mind of the learned court below the thought that appellant, the owner of the shore, who only sought to protect its right of ingress to and egress from its premises, was seeking to establish a private fishery. In this the learned court was in very serious and profound error.

It is also well to note that although in the answer to appellant's supplemental complaint, appellee McGowan claims to have had Oregon fishing licenses, it is not contended either by the pleadings, or by any evidence in the case, that locations were made, or operations conducted, under any Oregon license, or that the laws of Oregon were in any respect complied with.

After the cause was at issue, it was referred to a special master to take testimony, which testimony was accordingly taken and the cause was submitted upon such testimony, resulting in an interlocutory decree being entered on May 5, 1912, the court below not agreeing with the attorneys for appellees as to the rule for the measure of appellees' damages. The interlocutory decree entered at that time decreed that the appellees were entitled to operate these set net locations under Washington licenses, and that their right was superior to the right of the

appellant, and the appellant was enjoined from interfering with such set nets or set net locations up to the 21st day of March, 1912. This interlocutory decree is found at page 173, Transcript of Record, and the opinion of the court in that regard is found at page 166 thereof. After the entry of this interlocutory decree, the cause was referred to a special master, with instructions to take additional testimony and report his Findings of Facts and Conclusions of law. The report of the special master is found on page 179, Transcript of Record. The appellant seasonably interposed its exceptions to such findings. The exceptions are printed beginning with page 184 of the Transcript of Record. The exceptions were, however, overruled and a final decree entered, awarding to the appellees a judgment against the appellant in the sum of $22,083.00 and the costs of the action taxed at $948.30. From this judgment the plaintiff in the court below prosecutes this appeal.

DECISION OF JUDGE DONWORTH.

After the testimony and evidence had been taken and the case closed, the cause was submitted to His Honor Judge Donworth, who handed down his decision in writing, which we respectfully call this court's attention to. (Pg. 166, Transcript of Record).

At the hearing, before such decision, it was contended by the learned counsel for the appellees that the measure of their damage was the number and value of fish that could be caught by the operation

of the set nets complained of, and the case of Pacific Steam Whaling Co. v. Alaska Packers Association, 72 Pac. 161-5, was cited and discussed, and it was also contended that the number of fish that were caught by appellant and the value thereof in its seines operated on said island was competent evidence as to the amount of such damage. The appellees had at that time offered no testimony as to the fair rental value of their locations for set net purposes. Therefore, Judge Donworth in passing, employed the following language:

"There will be a reference to a master to ascertain the damages recoverable by defendants under the bond given on the restraining order. The measure of damages is one of the subjects discussed by the parties in their briefs. I do not consider that it would be a proper measure of damages to try to estimate how many fish defendants would have caught in the set nets and how much profit they would have made from them. Such a method is entirely too conjectural. The defendants are entitled, however, to the reasonable net rental value of the set net location, out of which they have been kept by reason of the restraining order. While the probable catch of fish by means of the set nets would be one of the circumstances affecting the net rental value, it would not in itself be the measure of damages."

In the face of this decision, the special master not only estimated the number of fish that would probably have been caught in a number of mythical

set nets which had never been operated, but took the quantity of fish that the appellant caught in its several seines which were operated over a territory many thousand times greater than the territory occupied by all of the appellees' set nets, and took the value of such fish as the damages sustained by the appellees. Judge Donworth having in the meantime resigned, Honorable Edward E. Cushman succeeded him, and upon exceptions to the master's report sustained all of them, leaving the case in a somewhat embarrassing situation to say the least with respect to the law of the case. This incongruous condition arose out of the fact that the State of Washington has never forgiven the people of the State of Oregon for the decision rendered by the Supreme Court of the United States, in the case of State of Washington v. State of Oregon, wherein the people of the State of Washington lost Sand Island. The appellant in this case had nothing whatever to do with that decision, and ought not be punished by reason thereof.

As we understand the issues and evidence, the legal propositions involved therein may be stated as follows:

FIRST: Had the lower court jurisdiction over the cause of action, it being conceded that the cause of action arose out of rights in real estate situated wholly without the State of Oregon?

SECOND: Did the licenses issued by the Fish Commissioner of the State of Washington to the appellees have any extra territorial force, or rather

were they not limited and confined within the territorial boundaries of Washington, and can any right to operate a fixed appliance in the Columbia River, wholly within Oregon, be based exclusively upon a license therefor issued by the Fish Commissioner of Washington, and locations made thereunder?

THIRD: Under the laws of the State of Oregon and decision of her court of last resort, does not a riparian proprietor own, as an incident thereto, the exclusive right of ingress to and egress from the line of navigability, limited, of course, to the general right of navigation and commerce?

FOURTH: Conceding that licenses issued by the Fish Commissioner of the State of Washington to construct and maintain a fixed structure do have extra territorial force and are enforcible and valid in Oregon, do the laws of Oregon as construed by its court of last resort permit the owner of such license, or any fishing license issued by any authority, to erect and maintain such fixed structure in front of an Oregon riparian proprietor, between the line of low water and the line of navigability, against the protest and consent of the owner of the shore and tide lands, whereby he will be deprived of free access to his shore?

FIFTH: It being conceded that Sand Island was wholly without the territorial boundaries of Oregon, can the appellees recover any damages whatever under their pleadings, taking into consideration that appellees in their cross-bills each plants

his entire cause of action upon rights alleged to have been acquired under licenses to operate set nets, issued by the Fish Commissioner of Washington, and locations made in compliance with the laws of Washington, but in violation of the laws of Oregon?

SIXTH: If appellees are entitled to damages, what is the rule for their measure of damage—the value of fish caught by appellant in its seines, or the value of fish that appellees imagine they might have caught, or the fair rental value of the premises for set net purposes?

Walter Bussey and I. N. Stensland were originally parties defendant. It subsequently appeared that each was only employees of the Appellee McGowan, and had no interest in the controversy, hence by agreement between the parties, the action was dismissed as to them, without cost to either party.

POINTS AND AUTHORITIES.

I.

This court is without jurisdiction over the cause of suit set forth in the bill of complaint, and is without jurisdiction over the cause of suit set forth in the cross-bills filed herein by the appellees.

Neither the cause of suit set forth in the bill of complaint, nor the causes of suit set forth in the cross bills filed by the appellees, arose on the Columbia River, within the meaning of the acts admitting the states of Oregon and Washington into the Union,

or the enabling acts of either, or the constitution of either of such states.

Act of Congress, May 2, 1853, 10 Sta. at Large, 172, Chap. 90.

Act of Congress, Feb. 14, 1859, 11 Sta. at Large, 383, Chap. 33.

M. & M. R. R. Co. v Ward, 67 U. S. 485.

Wood v. Marietta Chair Co., 158 U. S. 105.

North Ind. R. R. Co. v. Mich. Cent. R. R. Co., 15 How. 233.

Atlantic Dredging Co. v. Berger Neck Co., 44 Fed. 208.

Evansville Traction Co. v. Hudson Bridge Co., 134 Fed. 973-4.

12 A. & E. Ency. Pldgs. & Prac. 135.

Nielson v. Oregon, 29. Sup. Ct. 383.

Gilbert v. Moline Water Power Co., 19 Iowa 319.

Roberts v. Fullerton, 117 Wis. 222.

Indeed, the jurisdiction of the court, in this regard, had been adjudicated by that court.

In re. Mattson, 69 Fed. 535.

Ex Parte Desjiero, 152 Fed. 1004.

II.

The title and rights of riparian or littoral proprietors below high water mark, as well as the rights of riparian proprietors in all respects, are entirely governed by the laws of the state where located,

subject only to the paramount control of Congress over commerce and navigation.

Bowlby v. Shively, 152 U. S. 1; 14 Sup. Ct. Rep. 548.

Illinois v. Illinois Cent. Ry. Co., 184 U. S. 77.

Encyclopedia U. S. Sup. Ct., Vol. 8, pgs. 840-1.

1. Kinney on Irrigation and Water Rights, Sec. 453, et seq.

III.

Sand Island is and ever was within the boundaries of Oregon.

State of Washington v. Oregon, 29 Sup. Ct. Rep. 47-631.

IV.

Sand Island was, and ever has been, owned in fee by the United States.

Proclamation Abraham Lincoln, Plff's. Ex. "A".

Grisar v. McDowell, 73 U. S. 363 (Book 18, 863, L. ed.)

U. S. v. Payne, 8 Fed. 883.

Armstrong v. U. S., 13 Wall. 154 (Book 20 L. ed. 614).

United States also owned all the tide and shore land.

V.

The right of access to all points on the shore of a navigable water is an appurtenant to the land, and a riparian proprietor cannot be deprived of such

right without due process of law, and any interference therewith will be enjoined at the suit of the riparian proprietor.

Eagle Cliff Fishing Co. v. McGowan, et al. (Or.) 137 Pac. 766.

40 L. R. A., note page 605.

Gould on Waters, Sec. 149.

1 Farnham on Waters, pg. 290 et seq.

Lewis on Eminent Domain, Sec. 641.

San Francisco Savings Union v. R. G. R. Pet. etc. Co., 144 Cal. 134; 77 Pac. 823; 66 L. R. A. 242.

Yates v. Milwaukee, 10 Wall. 479 (19 L. ed. 984).

Angell on Water Courses, Sec. 67.

Broward v. Mabry, 50 So. 826 et seq.

Oliver v. Klamath etc. Co., 54 Or. 95.

Case v. Toftus, 39 Fed. 730-734.

Paine Lumber Co. v. U. S., 55 Fed. 855.

Carli v. Stillwater, 28 Minn. 373; 10 N. W. 205.

Hobart-Lee Tie Co. v. Stone, 135 Mo. App. 438; 117 S. W. 604.

Shephard v. Couer-d-Alene Lumber Co. (Idaho) 101 Pac. 591.

Parker v. Taylor, 7 Or. 448.

Shirley v. Bishop, 67 Cal. 543; 8 Pac. 82.

Angell on Water Courses, Sec. 67 (7th ed.).

1. Kinney on Irrigation and Water Rights, Sec. 453. 551, et seq.

1. Wiel, Water Rights in Western States. Sec. 5904.

Hume v. Turner, 42 Or. 202.

Hume v. Rogue River Pkg. Co., 51 Or. 240.

McCarty v. Murphy, 119 Wis. 159; 96 N. W. 531.

VI.

The right to draw seines upon and land same upon the tidelands on navigable waters is vested exclusively in the riparian owner and such right will be protected by injunction.

Eagle Cliff Fishing Co. v. McGowan, supra.

Angell on Water Courses (7th ed.) Sec. 67.

Commonwealth v. Shaw, 14 Serg & R. 9.

Gray v. Cann, 5 Day 72 (Conn.).

1 Farnham on Waters, Sec. 66.

2 Farnham on Waters, Sec. 872.

VII.

In Oregon, riparian rights attach to tide lands.

Eagle Cliff Fishing Co. v. McGowan, supra.

Parker v. Rogers, 8 Or. 183.

Wilson v. Welch, 12 Or. 353.

DeForce v. Welch, 10 Or. 508.

Shively v. Parker, 9 Or. 505-6.

Bowlby v. Shively, 22 Or. 410.

Also, in Oregon, a riparian proprietor may apply his frontage to any use not inconsistent with the right of the public.

Parker v. West Coast Pkg. Co., 17 Or. 510.

VIII.

Section 5294, Lord's Oregon Laws, reads as follows:

"It shall be unlawful for any person or persons to operate or maintain, or leave in condition to take fish, in any of the waters of this state at any time hereafter any fish trap, weir, pound net, set net, gill net, fish wheel, seine, or any device or apparatus or gear used in catching salmon fish or sturgeon without first obtaining from the Fish Warden a license therefore as hereinafter provided. (Act 1901, page 338, Session Laws of Oregon.)"

Under this law, the appellees had no set net locations. On the contrary, they were violating the laws of Oregon in attempting to operate set nets on the locations claimed by them.

IX.

CUSTOM.

Custom or usage cannot be proven simply by the personal opinion of witnesses. Both custom and usage must be proven by the evidence of facts, not of mere speculative opinions, and by witnesses who have had frequent and actual experience of the custom and usage, and do not speak from report alone.

Greenleaf on Evidence (13th ed.) Sec. 252.

2 Ency. of Ev., pg. 958 and cases cited.

Jones on Evidence, Sec. 463.

Armstrong v. Lake etc. Co., 147 N. Y. 495; 42 N. E. 186.

Horan v. Strachn, et al., 86 Ga. 408; 12 S. E. 681.

Williams v. Ninemire, 23 Wash. 593; 63 Pac. 534.

X.

CUSTOM ATTEMPTED TO BE ESTABLISHED BY THE EVIDENCE IN THIS CASE WAS A LOCAL CUSTOM.

This must have been pleaded.

22 Ency. of Pldg. & Pr., page 406 and cases cited.

XI.

MEASURE OF DAMAGES.

In any event, the measure of appellees' damages, if recoverable at all, is the value of the use of the set net locations. Profits they might possibly make in the operation are too remote.

Columbia & P. S. Co. v. Histogenetic Med. Co., 14 Wash. 475; 45 Pac. 29.

Wythe, v. Meyers, 3 Sawyer 595.

4 Southerland on Damages (3rd ed.) Secs. 994, 1011

Beach v. Morgan, 67 N. H. 529; 41 At. 349.

Mitchell v. Wood, 17 Kans. 26.

ARGUMENT.

WE RESPECTFULLY SUBMIT THAT THE LOWER COURT WAS WITHOUT JURISDICTION OF EITHER THE CAUSE OF SUIT AL-

LEGED IN THE BILL OF COMPLAINT OR EITHER OF THE CAUSES OF SUIT ALLEGED IN THE CROSS BILLS FILED BY THE DEFENDANTS.

As we have stated, after the decision in the case of State of Washington v. State of Oregon, 29 Sup. Ct. Rep. 47, 631, and before any evidence was taken, or costs incurred, the appellant, by motion, suggested to the court below that it was without jurisdiction of either the cause of suit alleged in the bill of complaint or in the cross bills filed by appellees.

This motion was duly presented and submitted before any evidence was taken or costs incurred, and by the court overruled. Appellant then obtained a rule permitting it to file a supplementary complaint, which it filed, alleging that the premises in controversy were entirely without the jurisdiction of the lower court and entirely within the territorial boundaries and jurisdiction of the State of Oregon. That at the time the suit was instituted appellant was informed and believed that such premises were within the boundaries of the State of Washington. That the State of Washington had at all times exercised exclusively jurisdiction over such premises, and fishing appliances employed thereon, but that by decree of the Supreme Court of the United States, in the case above mentioned, the premises were held to be within the boundaries of the State of Oregon.

The appellees filed an answer to this supplementary complaint, denying the allegations thereof,

and contending that the premises were in the State of Washington.

There is, however, no question but the premises lie wholly without the boundaries of Washington and entirely within the State of Oregon. Therefore, we respectfully submit that the lower court had no jurisdiction to enter any decree herein other than to dismiss this suit.

This is a question which this court must now determine, for we urge the proposition against any judgment against appellant herein. We believe the most cursory examination of this question will convince the court of the correctness of our contention.

It has always been a serious question in the minds of the lawyers of the State of Oregon and the judiciary as well as to whether Washington has concurrent jurisdiction "in civil and criminal cases upon the Columbia and Snake Rivers." The act of Congress admitting her into the Union does not so provide. The Act of May 2, 1853, dividing the territory of Oregon and creating out of a portion of it, the territory of Washington, contains the following provision:—

"The territory of Oregon and the territory of Washington shall have concurrent jurisdiction over all offenses committed on the Columbia River, where said river forms a common boundary between said territories."

Nothing said there about the Snake or any river other than the Columbia, **and nothing about civil cases.**

The next act touching on the subject is that of Feb. 14, 1859, admitting Oregon into the Union. Section one of that Act, after describing the boundaries of the state, contains the following provision:—

"Including jurisdiction in civil and criminal cases, upon the Columbia River and Snake River, concurrently with states and territories of which those rivers form a boundary in common with this State."

Section two of same Act contains the following provision:—

"The said State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same."

It will be observed that the provision quoted from the act defining or establishing the concurrent jurisdiction of the territories of Oregon and Washington **applies in criminal cases only.** The Act of Feb. 14, 1859, after defining the north boundary line of Oregon, provides, "including jurisdiction in civil and criminal cases upon the Columbia and Snake Rivers concurrently with states and territories of which those rivers form a boundary in common with these states;" but this contains no provision for concurrent jurisdiction with new states, as does the provision in section two of the same act above quoted. Since then Washington has been admitted into the Union, but the act admitting her makes no

provision for the exercise by her of even the concurrent jurisdiction with which, as a territory, she was vested. But even if it shall be held that admitting her into the Union with area she occupied as a territory, carries with it the concurrent jurisdiction with which she, as a territory was vested, it would only apply to "offenses committed on the Columbia River," and not to civil cases. It is true that the act admitting Oregon vested in her with "jurisdiction in civil and criminal cases upon the Columbia River and Snake River, concurrently with states and territories of which those rivers form a boundary in common" with her, and it may be well contended that such provision operate to vest concurrent jurisdiction in such states and territories, but it is to be observed that it is to Oregon and to her only that the "concurrent jurisdiction" is given. Her boundaries are described, and then, in addition to jurisdiction over that territory which would follow as a matter of course, it is provided, "**including** jurisdiction in civil and criminal cases" etc.; which was adding to her jurisdiction that which she otherwise would not have had. Washington was then a territory; Congress had power to extend or restrict her jurisdiction at will. It therefore said to Oregon, "we not only vest you with jurisdiction within your boundaries but also beyond your boundary line on the Columbia; there you shall exercise jurisdiction concurrently with Washington."

The provision in section one relative to "civil and criminal cases" did not vest in Oregon the pow-

er to regulate by legislation, matters arising on the river, hence the additional provision in said section two, granting to the State "concurrent jurisdiction on the Columbia" etc. etc. Not "in civil and criminal cases" only, but "jurisdiction" generally, which probably included legislative power or jurisdiction "upon" the river. The language, however, is always "on" or "upon the river." These expressions are equivalent to "on the water." Indeed, in section 2, Act of 1859, the concurrent jurisdiction vested in Oregon is, as we have seen, "on the Columbia and all other rivers and waters bordering on the said state of Oregon," etc.

SIMILAR PROVISIONS IN ACTS ADMITTING OTHER STATES.

As stated by the Supreme Court in Nielsen vs. Oregon, 29 Sup. Ct. Rep. 383, quoting "concurrent jurisdiction properly so called, on rivers, is familiar to our legislation." All the states bordering on the Missouri, Mississippi and other great rivers and waters, have similar provisions in their enabling acts. Numerous cases have involved the construction of such provisions, but in no case has it been held or even seriously considered, so far as we can discover, that such jurisdiction empowers the courts of one state to regulate or determine property rights in the bed or shores of rivers or waters within the boundaries of the opposite state. For instance, the provision in the Iowa enabling act is as follows:—

"That the State of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other

river bordering on the said State of Iowa, so far as the said river, shall form a common boundary to said state and any other state or states" etc. 5 U. S. Statutes at Large, 742.

In Gilbert vs. The Moline Water Power and Mfg. Co., 19 Iowa 319, the Supreme Court of that State held that an Iowa Court is without jurisdiction to abate a nuisance on the Illinois side of the river.

The defendant had "erected a dam across the south or slough channel of the Mississippi River" which was situated on the Illinois side of the river but opposite the premises of plaintiff in Iowa. In passing on the question, the court said:—

"Appellant bases the claim of jurisdiction upon the language of the acts admitting Illinois and Iowa into the Union, and the provisions of the Constitution and statutes of each in defining their respective boundaries. The act of 1818 (Ap. 18), admitting Illinois, gives to said state concurrent jurisdiction on the Mississippi river with any state or states to be formed west thereof, so far as the same shall form a common boundary. The act admitting Iowa contains the same provision as to concurrence of jurisdiction, Stat. at Large, 5,742. The statutes of Illinois recognize the same extent of jurisdiction; and in this state it is declared that our jurisdiction is concurrent on the waters of any river or lake which forms a common boundary between this and any other state. By our Constitution, our eastern bound-

ary is "the middle of the main channel of the Mississippi river." Preamble Rev. 986.

Now, while it is, of course, not claimed that the laws of this State would have inherent authority beyond the jurisdiction of the State, or that our laws can bind or affect property out of or beyond our territorial limits, it is insisted that this property, or that this alleged nuisance, is so situated that either State may direct the manner of its use, and order its removal or abatement if found to be of the character charged. That the Courts of Illinois might do this, there is, of course, no doubt. But the claim is, that our courts have the same concurrent right, on the complaint of one of our citizens, whose property, situated within our jurisdiction, is injured by the alleged unlawful obstruction. We do not believe, however, that the acts and constitutional provisions referred to include cases like that now before us.

There is an immense commerce on this great common highway. Water crafts, rafts, and boats of almost every kind and description, are each day floating upon its waters. Thousands of persons are engaged in this commerce. Contracts are made, and obligations assumed, for which these boats and crafts may, under certain proceedings, be made liable. Injuries are inflicted upon persons and property, by persons while on the river, or which they should be held answerable, criminally as well as civilly. If jurisdiction in all such cases were made to depend on the injury whether the boat or vessel was on one side or the other of the main channel,

whether the injury was inflicted or crime committed east or west, or north or south, of such line, it can be readily seen that it would frequently be almost impossible to determine such jurisdiction, and that a mistake in this respect would prove fatal to the action or prosecution, and hence the reason of making the jurisdiction concurrent in all such cases. Such property, and persons are, as a rule, transitory, moving—here today and gone tomorrow. Here is a common highway open to the citizens of all States and all nations. It is declared common territory, and, as to matter arising thereon, or persons found thereon, sovereignities on either side have common or concurrent jurisdiction. Not so, however, as to an obstruction where the property therein, and the use thereof, is wholly on one side of the channel. It is as though as unhealthy, dangerous or illegal manufactory should be erected and continued on the Illinois shore, to the injury and annoyance of citizens on the Iowa side; and though such an erection should extend below low water mark, there would be not jurisdiction to declare its abatement in our Courts. Such injuries are not on the river with the purview of the acts referred to and relied upon by counsel. And this conclusion is the more warrantable, when we consider that in this case the main dam extends from the shore to the island (Rock Island) that this island containing hundreds of acres of land, is indisputably a part of the territory of our Sister state, and that to reach this obstruction or nuisance, our Courts and the officers

thereof must go beyond this island and decree and procure the removal of a work attached to the main shore, and placed there, too, as we are bound to suppose, with the consent of the state to which the corporation owes its life."

It will be seen that the Court italicises the words "on" and "on the river." Continuing, the Court refers to the case of the M. & M. Railroad Co. vs. Ward, 67 U. S. 485, to which we also invite the attention of the court in this case. The plaintiff in that case sought to abate a bridge across the Mississippi river by a suit prosecuted in the U. S. Circuit Court for the District of Iowa. The Supreme Court of the United States held that the Iowa Court was without jurisdiction to abate that portion of the bridge on the Illinois side of the boundary line. It is sufficient to quote from the decision of the 19 Iowa case above referred to, without quoting from the U. S. Supreme Court decision, in the bridge case. After stating that which we have quoted above, the Iowa Court continued as follows:—

"All room for doubt upon the subject, however, is, it seems to us, removed by the case of the M. & M. Railroad Co. vs. Ward, 2 Black 485. The object of the bill, in that case, was to abate the Rock Island bridge across the Mississippi river, and situated a few miles below the construction complained of in this case. The bridge extends entirely across the river and has its abutments on either shore. And yet it was there held that the nuisance complained of, being a bridge across the Mississippi river, where

that river divides the States of Illinois and Iowa, and the State line being in the middle of the river, the District Court for Iowa has no power to abate the nuisance on the Illinois side, and that if the obstruction was created by piers erected on the Illinois side, that was an offense against the laws of Illinois, and neither a state court of Iowa or the Federal Court for the district, can inquire into the facts or furnish a remedy. Surely no case could be more decisive of the question involved in another, than this one is of that now before us. If this rule is correct when applied to a bridge, a large portion of which is indisputably within the limits of our state, there can be no room for controversy, when applied to a nuisance, every part of which is beyond the middle line which divides the states. And, indeed, that case carries the rule so far, that it might be overruled without substantially affecting the merits of the present controversy."

The doctrine announced by the U. S. Supreme Court in M. & M. Railroad Co. vs. Ward, has been cited and approved many times but never departed from and is unquestionably the law.

A more recent case and one clearly in point is that of Roberts vs. Fullerton, 117 Wisconsin 222. In that case, the defendant, an officer of the State of Minnesota, had seized and destroyed plaintiff's fish net, located by him to catch fish and staked to the bottom of Lake Pepin, on the Wisconsin side of the boundary line, said lake being a boundary water.

Plaintiff's action was for damages for such seizure and destruction.

Defendant justified under the laws of the State of Minnesota, which he alleged in his answer, authorized his action. A demurrer to the answer was sustained by the trial court and the case was appealed by defendant. The act of Congress was similar to that in the Oregon enabling act, being as follows:—

"The said State of Wisconsin shall have concurrent jurisdiction on the Mississippi and all rivers and waters bordering on the said state of Wisconsin, so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same."

The Wisconsin Supreme Court affirmed the ruling of the lower court and in passing on the question at pages 224-225 said:—

"The term, 'concurrent jurisdiction' does not imply, as the learned attorney general for the State of Minnesota seems to suppose, that the people of the two states in their sovereign capacities are joint owners of the bed of the Mississippi river within the scope of the enabling acts referred to, or of the waters of the river or the fish therein or things thereon, under the principle laid down in Rossmiller vs. State 114 Wis. 169, 89 N. W. 839. Ownership in that sense does not follow jurisdiction as the term was used in the enactments under discussion. It was competent for the national legislature, in the formation of the states, to extend the laws of each for certain purpose over territory of the other.

That was done, the jurisdiction on boundary waters being extended as to each state from shore to shore, while the boundary line between them was placed at the main channel of the river. That necessarily forms the boundary between them as to sovereign rights of ownership. Sovereign rights as regards ownership, of the bed of the Mississippi or anything permanently affixed thereto coincides with the territorial boundaries. Therein, as to everything of a tangible character forming part of the land, whether above the water or below the water, the jurisdiction of each state is exclusive."

And at page 228, the Court said:—

"The meaning of the language of the federal law giving concurrent jurisdiction on the waters of a boundary river is to be restrained to the purposes thereof. For all other purposes the jurisdiction of each state on its side of the main channel of the river is exclusive. For examples; one State can neither authorize nor abate a permanent object in the river within the territory of the other; it cannot tax property either in the river or on the river on the opposite side of the main channel thereof."

At page 230, the Court said:—

"However, we cannot come to the conclusion that 'concurrent jurisdiction' was used by Congress in the broad sense of the whole sovereign authority. That would be inconsistent with the decision of the federal court in Mississippi & M. R. Co. vs. Ward, 2 Black 485, as we have seen. It held, in a situation similar to the one involved here as regard the con-

current power of two states, that a permanent object in the river on one side of the main channel thereof, being wholly within the territorial limits of the state on that side, is subject to judicial control solely by the Courts of and for such state. Following that, as we have seen, courts have universally held that the words 'concurrent jurisdiction on' the river have reference to violation of law on the waters of the river actually or constructively. In Buck vs. Ellenbolt, 84 Iowa 394, —51 N. W. 22, it was held that the effect of Mississippi & M. R. Co. vs. Ward was to restrict the words 'concurrent jurisdiction' to actions in some way connected with the navigation of the river,—things on the river."

At page 235, the Court said:—

"Tested by the principle above adopted, do the mere police regulations of one country regarding the exercise of the common right of fishing extend into the territory of a foreign jurisdiction, the two being separated by an imperceptible boundary line in a river or lake? Is the common right of fishing which belongs to the people of this state within all that part of its territory on the easterly side of the main channel of the Mississippi subject to the laws of the state of Minnesota? There is no escaping the conclusion that if such is the case it is competent for that state to extend its police regulations as regards fishing and hunting over a large part of the waters of Lake Superior on the Wisconsin side, reaching up to the shore line, and for the State of Michigan to extend its laws on Lake Michigan on the same sub-

ject to the Wisconsin shore. We have searched in vain to find authority to sustain the affirmative of the proposition suggested. In no instance recorded in the books has one country been held entitled to exercise jurisdiction to regulate the common right of fishing in the territory of a foreign state under the measure of concurrent jurisdiction commonly exercised by the two on the waters divided by their boundary line. We venture to say that such concurrent jurisdiction has never been successfully invoked to justify interference by one state or country with the enjoyment of the right to fish within the territorial boundaries of the others. It would be foreign to the necessities of the case to enter into a discussion regarding the limits of that jurisdiction. It is sufficient for this case that we have reached the conclusion that, while it refers to acts of a criminal or civil nature on the water, or acts in some way connected with the use of the water for navigable purposes, it does not extend to the right of one state by legislature enactment to govern the fishery rights of the people in a foreign jurisdiction."

Applying the doctrine of the above cases to the case at bar, it seems clear that a Washington court is without jurisdiction to proceed therewith. That the pending case is of a local character, the decisions and authorities cited in the argumented heretofore made, clearly show. The Supreme Court of the United States in M. & M. Railroad Co., supra., denied jurisdiction to the Iowa Court over that part of the bridge in Illinois, because the subject matter was in

the latter state. Here appellant sought protection of its right to land seines on that part of Sand Island to which it had a lease. Appellees had planted obstructions in front in such manner that it could not operate its seines. If appellant had a lease to that portion of Sand Island as alleged, then it was entitled to an injunction restraining appellees from interfering with such right to draw seines and land the fish taken, on Sand Island. The appellees contend that, by virtue of licenses from the state of Washington, they are authorized to locate and maintain their set nets in front of that island. But the entire **locus in quo** is in the state of Oregon. Whatever right the appellant had to the use of the premises between its lands and the channel of the river depends entirely on the laws of Oregon. Before the lower court could proceed with the case, it was necessary to determine first, with what rights or interests is the appellant vested in Sand Island, and, if it appears that it has a lease as alleged, and that it is a valid one, then, second, under the laws of Oregon what rights has the appellant, as such bank and shore owner, in and to the use of the frontage?

Suppose a case where the owner of tide land on the south shore of the Columbia River was seeking to restrain a person from driving piling or erecting other obstruction in front of such tide land. Would a Federal Court in Washington have jurisdiction of the cause? Certainly not, and yet such case would be in all respects the same as this one.

We take it that "concurrent jurisdiction" in civ-

il cases contemplates cases arising on the water where it might be difficult to determine in which jurisdiction the cause of action arose, as for instance, actions for personal injury resulting in the death of the injured party, the action being provided for by the statute. In such case the injury must have occurred within the territorial jurisdiction of the state, the statute of which is invoked. We have long been of the opinion, also, that it contemplates the right in each state to have its process in civil cases served any place on the water, though we admit that we can find no authority sustaining that view. So far as we have been able to ascertain, the courts hold that it applies only to cases arising on the water, such as we have instanced.

But, as above stated, we are confident no case can be found that supports the view that a court of one state can adjudicate property rights of parties arising out of claims of title to or the right to use or occupy certain premises, shore lands or locations in the river beyond the boundary line of such state. Such actions are local as clearly as if the premises were entirely on upland. That portion of the bed of the river within the boundary line of a state, is as distinctly a part of its territory over which its jurisdiction is exclusive, as the uplands within its borders.

In this case, appellant bases its right to recover, on its ownership to land above the high tide, on Sand Island; that island being as distinctly and absolutely Oregon territory as any of the upland south of the river. The action of appellees, if appellant's allega-

tions are true, is a trespass on the appellant's premises, on its property rights in Sand Island and the shore thereof. How could a Federal Court of Washington enjoin that trespass? Its process cannot guard the rights of persons in or to property beyond the boundaries of the State of Washington. It cannot send its officers into the State of Oregon to remove obstructions to the enjoyment of real estate in that jurisdiction. It is difficult to define the term "concurrent jurisdiction," as it is employed in these statutes, but it is not difficult, we respectfully submit, to see and understand that it has no application to and does not include jursdiction in a case such as this.

This question has been determined by the Federal courts of both Washington and Oregon. We refer to the case of In re. Mattson, decided July 22, 1895, 69 Fed. 535 et seq. The facts in that case were that the petitioner Mattson was operating a pound net fish trap in the waters of the Columbia River north of the middle channel thereof, and entirely within the territory of the State of Washington, under a license from the state of Washington. Oregon claiming to act under the concurrent provisions of the act of Congress admitting it into the union enacted a law prohibiting pound nets to be operated on Sundays. Mattson operated this trap on Sunday. He was indicted by the Grand Jury of Clatsop County, Oregon, charged with the crime of violating the above statute and was tried before the court there and convicted. He then prosecuted a petition

for a writ of habeas corpus before the United States Circuit Court for Oregon. The matter being of considerable interest to both states, by request the Honorable C. H. Hanford, then United States District Judge for Washington, sat on the bench with the Oregon Justice, C. B. Bellinger, and the case was argued before the two judges, and it was there held that Oregon had no jurisdiction over a pound net fish trap erected beyond its territorial limits even though in the waters of the Columbia River.

It occurs to us this is decisive of this case. An examination of the pleadings will disclose this state of facts. The appellees base their sole right to operate a fixed appliance placed upon the bed of the Columbia River within the territorial boundaries of Oregon exclusively upon licenses issued to them by the Fish Commissioner of the State of Washington. This is their sole and only defense. They have no other defense. Therefore, if the Fish Commissioner of the State of Washington had no authority to grant a license beyond the territorial boundaries of his state, the appellees certainly had no locations whatever.

Section 5294, Lord's Oregon Laws, provides as follows:

"It shall be unlawful for any person or persons to operate or maintain, or leave in condition to take fish, in any of the waters of this state at any time hereafter any fish trap, weir, pound net, set net, gill net, fish wheel, seine or any device or apparatus or gear used in catching salmon fish or sturgeon with-

out first obtaining from the Fish Warden a license therefor as hereinafter provided. (Act 1901, page 338, Session Laws of Oregon.)"

Suitable penalty is provided for violation of the act. Therefore, the lower court had no jurisdiction over the cause of action, and the complaint, together with the answer of appellees and their cross-bills, clearly shows that the court was absolutely without jurisdiction.

It is true, that in a suit decided by the Supreme Court of Oregon hereinafter discussed, namely, Eagle Cliff Fishing Co., v. H. S. McGowan, et al., that court held the lower court had jurisdiction of the said causes of suit and counter claims. But this decision was based wholly upon the allegations in the bill of complaint and answers and cross complaints, that the premises in controversy were situate in the State of Washington. The correctness of such decision so founded upon the record in that case cannot be denied.

We do not question but that allegations of the complaint and cross-bills show the lands to be in Washington; but in this case, the record shows such lands to be in Oregon. Such being the admitted fact, we believe the lower court was without jurisdiction.

However, should this court disagree with us, without waiving this question, we respectfully submit was in error in denying appellant the relief demanded and in granting appellees any relief.

II.

THE APPELLANT DOES NOT CONTEND

THAT IT HAS THE EXCLUSIVE RIGHT TO FISH IN FRONT OF EITHER SITES 2 OR 3, NEITHER DOES IT CONTEND THAT APPELLEES DO NOT HAVE THE RIGHT TO FISH THERE. THE QUESTION AS TO WHETHER APPELLANT OR APPELLEES HAVE ANY FISHING RIGHTS IN SUCH WATERS IS NOT IN THIS CASE, AND CANNOT BE THRUST INTO IT, EXCEPTING IN THE MOST INCIDENTAL WAY.

The learned counsel for the appellees was successful in thrusting into this case on the hearing below a side issue, a proposition that it not in anywise involved herein and ought not be considered at all. All through the trial in the lower court, counsel for appellees craftily contended that this was a suit whereby appellant was attempting to establish in itself an exclusive right of fishery in front of the premises in controversy, and to exclude the defendants therefrom, and the lower court became obcessed with the same thought. Such is not the case. Appellant does not contend that it has any exclusive right of fishery in these waters. It does not contend that the appellees do not have the right of fishery therein, but concedes such right in each appellee—in fact, concedes that the public generally has the right to fish for salmon or other fish in front of said premises, and does not and never did contend that it can exclude any person whomsoever from fishing there.

The proposition contended for by appellant is this: that it is the lessee of all the tidelands adja-

cent to the two sites in controversy, through conveyances from the United States, the legal owner.

That, as such lessee, it has an appurtenant to such tidelands, the right of free access to and egress from said tide lands at all points fronting thereon, and that the appellees have wrongfully and without right or authority from any one erected, and are attempting to maintain in front thereof and between the line of low water and the line of navigability certain fixed structures, which interfere with its free ingress to and egress from the same. Appellant claims that such right, that is, access and egress, is a right appurtenant to the shore, and that it cannot be deprived of such right or interfered therewith, without due process of law, and that any interference therewith will be protected by injunction. That, if this contention is true, it does not matter what use appellant proposes to employ its property as long as such use is a lawful one. In this case, appellant desires to land its seines and boats thereon. And, in order to show that it has such right, it pleads a license to operate a seine in the waters of said river. It is for such purpose and such purpose only that the question of fishery can be thrust into this case. As we have said, the right of access to its property is an appurtenant to its tide land, and any interference therewith will be protected by injunction, and it matters not to the trespassing appellees what use the appellant proposes to employ its property. That is none of the trespassers' business. It would be a strange proposition, indeed, if before

the owner of real estate or an appurtenant thereto could exclude a trespasser therefrom he should be required to explain to the satisfaction of the trespasser not only the purpose for which it was desired to employ such property, but to further prove to such trespasser that the purpose was lawful. For the purpose of securing a preliminary injunction, it was necessary to show that appellant was suffering injury to its property rights, and that the further commission of such acts during the litigation would produce injury to it and its property. It was for this purpose that the proposed use of appellant's property was pleaded. Now, in order to defeat the injunction, it was cleverly and craftily suggested by appellees in the court below, and will doubtless, be claimed here, that the purpose of this suit was not to protect the appellant in its right of access, but to establish in it an exclusive right of fishery, and, therefore, in order to defeat appellant in establishing such exclusive fishery, it is necessary for this court to appropriate appellant's right of access and allow appellees to trespass upon and occupy appellant's frontage and exclude it therefrom. We repeat that no such question can be thrust into this case, for should the injunction prayed for have been granted, the appellees would still have the same right as the public to fish in such waters.

The proposition to be considered by this court is of vast importance. Many hundreds of thousands of dollars are invested in tide lands and in tide islands,whose value alone is the exclusive right to

draw seines thereover, and land seines thereon. And if any person armed with a license to catch fish shall have the right to thrust in and maintain permanent fixtures or structures in front of such tide lands, then these thousands of dollars which the citizens of such state have invested in such property will be turned over to a roving band of pirates. The right of tide land proprietors on the Columbia River to free and uninterrupted ingress to and egress from his frontage has been recognized for years, and such right protected by every Circuit Court in Oregon which has had occasion to pass upon the same. This is a part of the history of the jurisprudence of such state, and large sums of money have been expended and large property rights have been acquired based upon such construction, and we submit that strong must be the argument, and persuasive, indeed, must be the solicitor to induce this court at this day to overturn the acknowledged and accepted rule of property rights so long established and universally recognized and respected.

III.

THE RIGHT OF INGRESS TO AND EGRESS FROM TIDE LANDS ON NAVIGABLE RIVERS AND WATERS IS AN APPURTENANT TO THE LAND ITSELF AND CANNOT BE INTERFERED WITH OR THE PROPRIETORS DEPRIVED THEREFROM WITHOUT DUE PROCESS OF LAW, AND ANY INTERFERENCE THEREWITH WILL BE PROTECTED BY INJUNCTION.

The above doctrine is universally announced by every court in the world without exception. It is laid down by all text writers, and denied by none.

Gould on Waters, Section 149, lays down the following doctrine:

"Riparian rights exist on the banks of navigable waters, as well as of non-navigable streams. In the former case, they are subordinate to the public right of navigation * * *. The rights actually exercised by the proprietors of land on the shores of tide water are often dissimilar from those enjoyed by proprietors above the flow of the tide * * *. But a littoral proprietor, like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded to him to the water for the purpose of using the right of navigation. This right of access is his only and exists by virtue and in respect of his riparian property. * * * This riparian right is property and is valuable, and although it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with the established law and if necessary that it be taken for the public good upon due compensation."

Lewis on Eminent Domain, Section 77 et seq. 83, lays down the same doctrine. Judge Lewis summarizes the decisions and announces his conclusions as follows:—

"Section 83. In conclusion, the following rights may be enumerated as appurtentant to property upon public waters.

First: The right to be and remain a riparian proprietor and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water.

Second: The right of access to the water, including a right of way to and from the navigable water.

Third: The right to build a pier or wharf out to navigable water, subject to any regulations of the state.

Fourth: The right to accretions or alluvium.

Fifth: The right to make a reasonable use of the water as it flows past or leaves the land."

This eminent author lays down the doctrine that any interference with this right of access is an interference with the right of property and is a taking within the constitutional limitations providing against the taking of property without due compensation.

Judge Cooley in his work on constitutional limitations, page 544, in discussing this right of access, uses the following language:

"So far as these cases hold, if competent to cut off a riparian proprietor from access to the navigable water, they seem to us to justify an appropriation of his property without compensation."

In Angell on Water Courses, a very valuable note is found on pages 372-3, in which a large num-

ber of authorities are collated, and it is there announced by the author as his judgment that the right of ingress to and egress from the shore of a navigable water is appurtenant to the land, and any interference therewith can be enjoined at the suit of the riparian proprietor.

This author, in section 67, announces the following doctrine:

"The riparian proprietor has the sole right, unless he has granted it, to fish with nets or seines in connection with his own land."

"It was expressly held in Lay v. King, in the Supreme Court of Connecticut, that a riparian proprietor on the river Connecticut near its mouth had an exclusive right to draw a seine on his own land, although the right of fishing on the water was free and common to all of the citizens of the state. This exclusive right is considered to give all the owners of land on the margin of the river Schuylkill such advantage that it has been hardly worth while for any person to attempt to fish with seines."

"The right of property in front of a river, is therefore, valuable and is called a fishery and one which, in some places, is rented for a considerable sum of money."

Further along in the same section, this author announces the following doctrine:

"The right of landing with and drawing seines upon another's land is, undoubtedly, an easement, and, therefore, as in the case just above referred to,

may be acquired by prescription, like a right of way."

Gould on Waters approves this doctrine. Section 100, where this author says "a littoral proprietor has exclusive right to draw a boat or seine on his own land", citing Skinner v. Hettrick, 73 N. C. 53; Hettrick v. Skinner, 82 N. C. 65-68; Bradley Fish Co. v. Dudley, 37 Conn. 136.

Farnham on Water and Water Rights, the latest work on the subject, announces the doctrine that the owner of shore on a navigable water as an appurtenant thereto has the right of access thereto, and any interference therewith will be enjoined by injunction.

3 Farnham on Water and Water Rights, Sec. 872.

1 Farnham on Water and Water Rights, Sec. 66.

In Carli v. Stillwater etc. Ry. Co., 28 Minn. 373; 10 N. W. 205, Clark, Justice, says "the owner of land bounded by a navigable stream has the right by virtue of the ownership of the bank to enjoy free communication between his abutting premises and the navigable channel of the river * * * and to this extent, is entitled to the exclusive occupancy of the bed of the stream, subordinate and subject only to the rights of the public with respect of navigation and such needful rules and regulations for their protection as may be prescribed by competent legislative authority, and such riparian rights are property and cannot lawfully be taken for public use without just compensation."

The Supreme Court of Idaho, in Shepherd v. Couer-d-Alene Lumber Co., 101 Pac. 591, through Ailshie, Justice, says: "Navigable streams are public highways over which every citizen has a natural right to carry commerce, whether by boats or the simple floating of logs, * * *. The right of a riparian owner to use a stream implies the necessity, as well as the right, to pass from the shore to the navigable waters of the stream, and this in turn must require some effective means or medium by which to reach such point for loading or unloading the commercial and floatable commodity."

Further on, this same court says, "the right of ingress to and egress from the lands of a riparian owner is a property right and must be respected, and for the protection of which, the courts will afford a remedy."

The Supreme Court of the State of Missouri, in Hobart-Lee Tie Co. v. Stone, 117 S. W. 604, through Reynolds, Justice, announces the following doctrine:

"The owner of land bounded by a navigable river has the right of access to the navigable part of the river in front of its premises and the right to use of the waters for all purposes not inconsistent with the public right of navigation therein."

The same doctrine is announced by the Supreme Court of California, in Shirley v. Bishop, 67 Cal. 543, and San Francisco etc. Union v. R. C. R. etc. Co., 144 Cal. 134; 77 Pac. 823. In the latter case, is announced the following doctrine:

"The erection of obstructions below ordinary high

water mark in front of land of a littoral proprietor whose land abut on the ocean, which obstructions interfere with and prevent access to and use of the ocean highway by the littoral proprietor constitutes a private nuisance as to him, and he may maintain an action to abate it."

The Supreme Court of the State of Wisconsin, in McCarthy v. Murphy, 119 Wis. 150; 96 N. W. 531-532, lays down the following doctrine:

A riparian proprietor "as proprietor of the adjoining land and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place. He has the right to build piers and wharves in front of his land out to navigable waters in aid of navigation not interfering with the public use. These are private rights incident to the ownership of the shore, which he possesses distinct from the rest of the public."

"An intrusion of another's riparian rights is a legal wrong which the law will redress, nor can a stranger by such intrusion on the bed of the water acquire any vested rights or interests as against the riparian owners. Any structure erected by him under such circumstances is a private nuisance."

The leading case on this subject is Yates v. Milwaukee, 10 Wall. 479; 19 L. ed. 984.

Justice Miller announces the following doctrine:

"Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream—and among

these rights are access to the navigable part of the river from the front of his lot * * *."

"This riparian right is property and is valuable, and that it must be enjoyed by due subjection to the rights of the public and cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with the established law and if necessary that it be taken for the public good upon due compensation."

We have yet to discover a single author, or the decision of any court, holding contrary to the doctrine above contended for. The authorities are numerous and uniform that the rights of a riparian proprietor, among other things, includes the free and unobstructed ingress to and egress from his shore line. That this is property and any interference therewith will be protected by the courts.

In the case of Hume v. Rogue River Packing Co., 51 Or. 240, the lower court held that Mr. Hume, as a riparian owner, had the right to complain against and enjoin a set net location exactly similar to the set nets sought to be placed in front of plaintiff's premises here, placed in front of Mr. Hume's tide lands between ordinary water mark and the navigable channel and same were a private nuisance, as to Mr. Hume, and an injunction was issued. The attorneys for Mr. Hume and the attorneys for the Packing Co. and all parties interested conceded such to be the law. Judge Hamilton tried this case in the court below and held under identically the

same state of facts disclosed by appellant's bill of complaint here, that plaintiff was entitled to his injunction. Judge Hamilton held a tide land owner had the exclusive right to draw seines upon his land, and that any person placing any structure or fixed appliance in front of his land which in anywise interfered with the drawing of such seines was a private nuisance, for which an injunction was issued.

The same doctrine was held in the case of Hume v. Turner, 42 Or. 202. The rule here contended for has become a part of the jurisprudence of Oregon. The latest case involving this question which, if followed by this court, is decisive, is Eagle Cliff Fishing Co. v. McGowan, et al., 137 Pac. 766.

As we understand the law applicable to this case, the decision of the Supreme Court in Eagle Cliff Fishing Co. v. McGowan, is binding upon this court and is decisive in this case. The facts in the Eagle Cliff Fishing Co. case are identical with the facts in the case at bar, and every legal proposition involved in this case is decided adversely to the appellees. The only difference in the two cases is that in this case the appellees claim the right to maintain fixed fishing appliances in the bed of the Columbia River, within the territorial boundaries of Oregon, under a license to construct and operate such appliances issued by authority of the State of Washington; otherwise, the two cases are identical. In the Eagle Cliff Fishing Co. case, that company acquired in 1912 a lease from the United States, through the Secretary of War, pursuant to the said

Act of July 20, 1847, to these same Sites 2 and 3, together with Site No. 1. It immediately obtained a license to operate seines on such sites from the Master Fish Warden of Oregon pursuant to the laws of such state. It had made all arrangements for operating seines thereon and took its outfit down upon the island, and when it arrived there it found that the appellees in this case, H. S. McGowan, Erick Lindstrom and J. P. Coyle, together with three brothers of appellee H. S. McGowan, namely John McGowan, James McGowan and Charles McGowan, had placed in the waters of the Columbia River, in front of the shore to said sites and between such shore and the navigable channel of the river, a large number of buoys and anchors. The Eagle Cliff Fishing Co. immediately instituted a suit in the Circuit Court for Clatsop County where it obtained a preliminary injunction, enjoining them from maintaining such obstructions, and they were accordingly removed. The defendants in that suit appeared and interposed an answer, claiming that the structures complained of were buoys and anchors upon which it was proposed to operate set nets and seines, and each party claiming a superior right to do so, because of the fact that the licenses obtained by them anti-dated the licenses obtained by the Eagle Cliff Fishing Co., and because of the fact that locations had been made by them prior to locations made by the Eagle Cliff Fishing Co., and also upon the ground of prior occupancy by the McGowans—in fact, the same defense was interposed by the Mc-

Gowans in that suit that was interposed by the appellees in this suit, with the exception only that each party was armed with licenses issued by authority of the State of Oregon. The Eagle Cliff Fishing Co. claimed that it was the owner of the shore and tidelands, and as such owner, as an incident thereto that the private right of access to every part of the water bordering thereon the navigable channel of the river, and that this was properly right and could not be taken from it without due process of law. This is precisively the claim made by the appellant in this suit. The matter was tried before the Circuit Court for Clatsop County, State of Oregon, resulting in a decree in favor of Eagle Cliff Fishing Co. against the McGowans and defendants in that suit, whereby each was enjoined from further maintaining the obstructions complained of. An appeal was taken from such decree by the defendants to the Supreme Court of the State of Oregon. Some of the ablest attorneys of the State of Oregon appeared for the McGowans, and the matter was exhaustively briefed and argued before the Supreme Court, and every proposition that has been suggested here was suggested there; but the Supreme Court of the State of Oregon held that the licensee of the United States to Sites 1, 2, and 3, on Sand Island, was entitled of right to the free and unobstructed ingress to and egress from such shore to the navigable channel of the river, for the purpose of hauling and landing seines from the water, and for the purpose of launching the same from the shores into the

water, and that under the laws of the State of Oregon, one armed with a license to operate a set net or fixed appliance was not authorized to erect or maintain one in front of such tideland owner.

Mr. Justice Moore in discussing the case laid down the following proposition:

"As an incident to the lawful occupancy of lands, one border of which is the low water line of the Columbia River, the plaintiff had the private right of access at such sites to and from that stream. Micelli v. Andrus, 61 Or. 78, 120 Pac. 737; Van Dusen Inv. Co. v. Western Fishing Co., 63 Or. 7, 124, Pac 677, 126 Pac. 604. In Yates v. Milwaukee, 10 Wall. 497, 504 (19 L. ed. 984), Mr. Justice Miller, discussing the question of access to the navigable part of a river says: 'This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for public good, upon due compensation.' In that case the right of access was recognized as pertaining to the upland owner. Weber v. Harbor Commissioners, 18 Wall. 57, 65, 21 L. ed. 798. The right is here referred to, however, in order to show its acknowledged importance to the person lawfully entitled thereto.

Upon the admission of Oregon to the Union February 14, 1859, the state took the title to all that part of the bed of the Columbia river, near its mouth,

that is situate south of the middle of the north ship channel of that stream. 11 Stat. 383, c. 33. The margin of Oregon's ownership of the bed of a navigable stream is the mark made on its bank by the line of ordinary high water. Micelli v. Andrus, 61 Or. 78, 84, 120 Pac. 737, and cases cited. Subject to the paramount right of navigation, the state, pursuant to legislative enactments, has been authorized to sell and convey any part of its land lying between ordinary high water and low water, and the grantee of such tidelands is the riparian proprietor to the exclusion of the upland owner. Bowlby v. Shively, 22 Or. 410, 30 Pac. 154.

Though the right of fishing in a navigable stream in Oregon is free and common to all the citizens of the state, the tideland owner on such a stream has the exclusive right to draw a seine on his own land. Hume v. Rogue River Packing Co., 51 Or. 237, 244, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732. While in the case at bar the sole privilege thus adverted to is held by the plaintiff in consequence of its posession of the demised premises, which right is undoubtedly of great advantage in landing salmon entrapped by a seine, such lawful occupant of the sites mentioned is not entitled to, and cannot exercise at such place, any prerogative in the manner of catching such fish differing from that which can be legally asserted by every other citizen of the state. Hume v. Rogue River Packing Co., supra.

The buoys placed in the river to indicate the lo-

cation of the lines intended to be occupied by the set nets, and the large rocks by means of which such floats were anchored, and the buoys fastened to the cable, if allowed to remain in the stream, would necessarily have prevented the plaintiff from hauling its seines to the shore. Notwithstanding such obstructions, it is contended by the defendants' counsel that the state, being the owner of the bed of the river, had, as an exercise of its police power, authority to grant an exclusive right of fishing in front of the sites described; that, their clients having obtained the prior licenses to catch salmon in the manner described, their privilege in this respect is superior to all others; that the spaces of 550 to 900 feet within the lines selected for the set nets afforded the plaintiff reasonable access from the tidelands to navigable water; and that the cable which lay on the bed of the stream did not constitute any obstruction to such right of passage. Based on these assertions, it is insisted that an error was committed in granting the relief prayed for in the complaint, and that an affirmance of the decree would be tantamount to giving plaintiff the exclusive right of fishing in front of Sand Island.

The provisions of the statute regulating the catching of salmon may be summarized as follows: The Governor, the Secretary of State, and State Treasurer, constitute the board of fish commissioners, whose duty it is to appoint a master fish warden. L. O. L. Sec. 5272. The fish warden is required to collect all license fees, and pay the same to the State

Treasurer, to be placed in the hatchery fund to be used for hatchery purposes. Id. Sec. 5283. It is unlawful for any person to operate in any waters of the state a set net or a seine without first having obtained from the fish warden a license therefor. Id, Sec. 5294. It is unlawful for any person to fish for salmon in any waters of this state, unless he is a citizen of the United States, or has declared his intention to become such, and, for a period of six months, has been a bona fide resident of the State of Oregon or of another state bordering upon the Columbia river. Id. Sec. 5298. Certain sums of money are annually collected from persons operating set nets, gill nets, seines, etc., and from cannerymen of, and from dealers in, salmon for licenses granted for that purpose. Every license so issued is required to be numbered and dated, and shall terminate on the 31st of March following its issuance. Id. Sec. 5203. Any person having obtained a license to operate a set net shall cause to be placed and maintained on the bank of the river, or upon a buoy securely anchored in the stream on the location claimed, the number of such license, and for a seine he shall also cause to be placed and maintained on the seining ground the number so designated by the master fish warden. Id. Sec. 5304.

Evidently the purpose of the statute in thus licensing persons engaged in catching salmon in nets and by seines was to protect such individuals from intrusion by non-resident fishermen who came to this state during the open season to pursue their occu-

pation, and not particularly to designate, with respect to such means of taking fish, the places where the business might be conducted. The sums of money obtained by issuing such licenses were undoubtedly designed to create a fund to be used in propagating such species of fish, in order that the supply might not be wholly exhausted. Although the statute specifies the location claimed by the licensee of a set net must be evidenced as indicated, the enactment does not expressly provide that the privilege so bestowed shall be exclusive as to such place. An exclusive right of fishing in a navigable stream cannot be granted to any person by a state, under a Constitution like ours, forbidding the creation of monopolies in the pursuit of a lawful undertaking. Hume v. Rogue River Packing Co., 51 Or. 237, 259, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732.

It is believed that the obstructions placed by the defendants in the Columbia river were not authorized by statute, and that they tended to create an exclusive right of fishing, the continuance of which was properly enjoined. Nor is it thought that plaintiff, by reason its sole right to draw a seine upon its own ground, will be granted an exclusive right to catch salmon at the place indicated, for the testimony shows that fishermen operating gill nets made drifts in front of and behind such seines when they were being operated.

The defendants had intended to remove any salmon that they might catch in a seine to a boat

moored to the cable. Their right to tow a seine over the same ground is admitted; but they must remove the salmon thus caught upon a steamer or other craft adapted to that purpose.

Believing that the decree is a correct adjudication of the rights of the parties, it is affirmed."

Therefore, in Oregon a riparian owner owns the free right of ingress to and egress from his premises, and according to the decision of its courts, has the right to enjoin the placing of set nets in front of his shore and between the shore and the line of navigability of the navigable waters fronting thereon. This being true, we submit that this is binding upon the Federal courts, and this court must follow the rule announced in the Eagle Cliff Fishing Co. case as above set forth.

IV.

RIGHTS OF RIPARIAN PROPRIETORS ARE DETERMINED BY THE LAWS OF EACH STATE AND THE DECISIONS OF ITS COURT OF LAST RESORT.

No principle is better settled than that the right of a riparian owner is determinable entirely by the laws of each state and decisions of its court of last resort, subject only to the paramount right in congress to control commerce and navigation, and that the entire subject of the rights of riparian proprietors and the limitations thereof are left entirely to the states, and the Federal Courts are bound to follow the rulings and decisions of the state courts in their interpretation of such rights.

In Hardan v. Jordan, 140 U. S. 242-250; 11 Sup. Ct. Rep. 808-858, Justice Brewer says: "Beyond all dispute, the settled law of this court established by repeated decisions is, that the question how far the title of a riparian owner extends is one of local law. For a determination of that question, the statutes of the state and the decisions of its highest court furnish the best and final authority."

Again, in Illinois Cent. R. R. v. Illinois, 148 U. S. 387 et seq.; 13 Sup. Ct. Rep. 110, Justice Fields says:

"It is the settled law of this country that the ownership of a dominion and sovereignty over lands covered by tide waters within the limits of the several states belong to the respectve states within which they are found, with the consequent right to use or dispose of any portion thereof, and that can be done without substantial impairment of the interests of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among states."

These cases were followed by the case of Shively v. Bowlby, 152 U. S. 1; 14 Sup. Ct. Rep. 548-565, where the doctrines above announced were quoted with approval. The authorities announcing this doctrine are too numerous to occupy any time in discussing them. If this court desires further citation on this point, cite Vol 8, Ency. of U. S. Sup Ct. Rep., pages 840-841, where the author of that excellent work lays down the rule as follows:

"The question is now of state regulation, subject to the paramount control of congress for commerce and navigation."

In the light of the decision in the case of Eagle Cliff Fishing Co. v. McGowan, et al., supra., and the rule so frequently announced by the Supreme Court of the United States above referred to, we submit there can be but one conclusion reached in this case, namely, that the judgment of the lower court must be reversed. Should the court, however, refuse to follow the rule announced by the Supreme Court of Oregon we submit that under the pleadings, evidence and law, the lower court was in error and must be reversed.

Appellees were violators of the laws of Oregon. Under the laws of the State of Oregon at the time appellees claimed to have made locations of their set nets, and during the entire period which they claim they were damaged because of the fact they could not operate them, they were violators of the laws of Oregon.

Section 5294, Lord's Oregon Laws, reads as follows:

"It shall be unlawful for any person or persons to operate or maintain, or leave in condition to take fish, in any of the waters of this state at any time hereafter any fish trap, weir, pound net, set net, gill net, fish wheel, seine, or any device or apparatus or gear used in catching salmon fish or sturgeon without first obtaining from the Fish Warden a li-

cense thereof as hereinafter provided. (Act 1901, page 338, Session Laws of Oregon.)"

The evidence in this case shows clearly that neither of the appellees complied with the above statute, and neither attempted to comply.

As we have stated, the appellees base their entire claim for damages upon rights to operate set nets located under a license from the State of Washington, and in direct violation of the laws of the State of Oregon. Upon what principle can such a claim be sustained? Can any one base a right of action in direct violation of an express statute? It is unnecessary to cite authorities in support of this proposition. Under the laws of Oregon, neither of the appellees was entitled to operate set nets. If they had no such rights, then they could not be damaged by the removal of the set nets. But should the court be of the opinion that appellees nevertheless were entitled to compensation because of the fact that the appellant prohibited them from operating set nets in front of these sites, it then becomes important to determine whether or not the evidence shows that the appellees suffered any damages, that is, conceding that they were wrongfully deprived of the use of their set nets. We submit that an examination of the evidence in this case will show that if the appellees were damaged, they failed to offer any legal testimony showing it. We believe an examination and discussion of the findings of facts made by the special master and confirmed by the lower court will convey to the court

a clear idea of our position, as well as the evidence offered in support thereof. It will be remembered that upon the filing of these findings, appellant, through its attorney, interposed proper exceptions, and these exceptions are properly set forth in our assignments of error.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW.

In the opinion handed down by His Honor Judge Donworth, prior to the appointment of a special master to take additional evidence and report findings of law and fact, page 172, Transcript of Record, the rule for the measure of appellees' damages understood by him was announced. Not only that, but the court clearly stated that the estimated number of fish appellees though they might have caught in their set nets and how much profit they guessed they would have made thereby were too conjectural and could not be the rule for the measure of appellees' damages, to be followed by the master. The master was instructed to determine the fair rental value of the set net locations, and when this was determined from the evidence, such would be appellees' damages.

The special master, however, overruled Judge Donworth, and held that the damages sustained by appellees was to be determined solely and exclusively from the number of fish which they estimated they could have caught by the use of their set nets on their set net locations, and accordingly found that they could have caught during the years 1908, 1909,

1910 and 1911, 518 tons of fish of the value of $130.00 per ton, aggregating $22,360.00. Upon the cause being referred to a special master, the appellees instead of following the rule announced by the court ignored it entirely, and offered evidence cumulative only of that theretofore offered, and which the court, after due consideration, had held incompetent, and the special master, likewise, ignored the decision of said court and found in direct opposition to the court's ruling. Judge Donworth having retired, the findings of the special master and exceptions thereto were heard before Honorable Edward E. Cushman, who likewise overruled Judge Donworth, and adopted the same rule for the measure of appellees' damages announced by the special master, and approved the findings with a slight reduction in the amount.

V.

CUSTOM.

After the cause was referred to the master under the decision of Judge Donworth, appellees entirely changed their theory, and abandoned their original claim as to their damages, and attempted to offer proof of an alleged local custom among trapmen and some fishermen to charge as rental for their fishing locations one-third of the catch where the lessor furnished the gear, and two-thirds when gear is furnished by the lessor. We think such evidence was not within the issue.

VI.

APPELLEES' CROSS-BILLS.

The appellees in their cross bills, at great length, prolixity and particularly plead their claim for damages, and their entire plea is that their entire damages consists in the number and value of the fish which they could and would have caught had they been permitted to operate their locations. Nowhere is the rental value, or the value of the use of the premises, averred.

Therefore, under their pleadings, they are not entitled to prove any alleged custom. Of course, our contention has been all along that the appellees having in their cross-bills alleged their damages to the date of filing their bills could recover no damages occurring thereafter. But be that as it may, proof of a local custom was not competent under the issues.

VII.

LOCAL CUSTOM MUST BE PLEADED.

As we have stated, this alleged custom as claimed was local, and, as we understand it, in order that appellees should take advantage of it, they must have plead it. This seems to be the general rule.

22 Ency. Pldg. & Prac., pg. 406 and cases cited.

But outside of the question of pleading, we repeat that there is not in this record a scintilla of competent evidence supporting a finding of a custom.

VIII.

CUSTOM OF 1912.

Furthermore, the evidence of every witness as to this alleged custom or rule was taken during the month of April, 1912. An examination of the evidence of all of appellees' witnesses as to this alleged custom will show that they all testified as to an alleged custom or rule which prevailed then. Not one was asked as to whether such custom or rule prevailed prior to 1912.

In fact, there is no evidence that this alleged custom or rule prevailed at any time or any place other than in the imagination of three of appellees' witnesses, and this not to set net locations.

IX.

PROOF OF CUSTOM AND USAGE.

Custom or usage cannot be proven simply by the personal opinion of witnesses. Custom, if it exists, must be proven as a fact the same as any other fact. The opinion of a witness cannot establish such fact. This is fundamental.

Greenleaf on Evidence (13th ed.) Sec. 252. This author, in discussing this question, says:

"Both custom and usage must be proven by evidence of facts, not of mere speculative opinions, and by witnesses who have had frequent and actual experience of the custom and usage, and do not speak from report alone."

3. Ency. of Ev., pg. 958, and cases cited.

The evidence shows that never in the history of

salmon industry on the lower Columbia River has a set net location ever been leased or rented.

The witnesses who pretended to testify concerning a custom or rule knew and spoke of pound nets, seining locations, and boat and gill net appliances, and none other, and gave it as their opinion that it, as a matter of law, applied to set net locations.

It is a rule of universal construction, that custom can only be established by facts showing its existence for at least a sufficient length of time to have become generally known, and this is for the court to determine from the facts. Jones on Evidence, Sec. 463.

There is absolutely no evidence showing, or tending to show, that this alleged custom or rule had ever existed at all, excepting in the minds of the witnesses themselves, and then only whilst on the stand.

In Armstrong v. Lake etc. Co., 147 N. Y. 495, 42 N. E. 186, the Supreme Court of New York, through Andrews, C. J., says:

"That custom must be collected **not from what witnesses say** they think the custom is, but from what was publicly done throughout the district."

In Horan v. Strachn, et al., 86 Ga. 408, 12 S. E. 681, the Supreme Court of Georgia, through Summons, J., in discussing the rule of custom says:

"None of the witnesses cite any instance where any commissions or disbursements were charged and allowed to one who did not furnish the money.

It is true that most of the witnesses gave it as their opinion that the person in charge of the ship would be entitled to the commission, but custom is not a question of opinion, but of fact, and cannot be proved by the opinion of witnesses that it ought to be so and so."

It must be proved that the custom exists, that it is a fact. The court and jury cannot act upon the opinion of witnesses, they must be guided by that which has been the practice **and no witness testified to any instance where the agent had received these commissions.**

The correctness of the above rule contended for by us has been clearly established in Washington. We refer to the case of Williams v. Ninemire, 23 Wash. 593; 63 Pac. 534-538, where Justice White says:

"Usages being a fact, and to be proved as a fact, it follows that the existence of a usage cannot be established by the mere opinions of witnesses as to what the law is, as applied to the case in hand. It often happens that what is supposed to be a usage of trade is merely the general opinion of persons as to their rights and liabilities under certain facts. Such opinion cannot constitute a usage. * * * It must be a method of dealing with certain facts, and not a conclusion as to the rules of law pertaining to those facts. 27 Am. & Eng. Enc. Law, 736. See also Cox v. O'Riley, 58 Am. Dec. 633; Press Co. v. Standard, 100 Am. Dec. 255."

Now, no witness in this case testified to any

instance where this alleged custom had been acted upon, as to any character of fishing appliance, or location, and especially is this true as to set net locations, and no instance could be cited for the reason none had occurred.

X.

FINDINGS ARE NOT SUPPORTED BY ANY EVIDENCE.

The truly astonishing thing is, that the findings of the special master as sustained by the court below, excepting only as to the quantity and value of fish caught by appellant during the years 1908, 1909 and 1910 (but not 1911), and the fact that appellees were not permitted to operate set nets on their alleged locations, are not supported by a scintilla of competent evidence. We make this statement without any qualifications whatever, and shall endeavor to demonstrate its accuracy.

(1) We will first consider findings No. I and II.

These findings are in effect, that according to a custom long established among fishermen on the Columbia River, the rental value of a fishing location is determined for rental purposes as follows: Where the owner rents the ground alone, one-third of the value of the fish taken ,but where he furnishes all gear, then the value of two-thirds of the fish is the rental value, and that such rental value cannot be ascertained until the end of the fishing season.

There was not a single witness that testified that he ever knew or heard of a set net location on the lower Columbia River beng rented under any circumstances whatever. In fact, every witness on behalf of appellees testified that they never knew or heard of any set net being operated on the lower Columbia River during the regular spring or fall salmon fishing season. They all testified that salmon fishing on the lower Columbia River was conducticed exclusively by seines, gill nets and fsh traps generally known as pound nets, and it is to such and such only any evidence was given on their part. Two witnesses testified that they heard of some few set nets being operated simply to catch a few fish during the winter season, one sometime in 1860 or 1870. The other, Amon Markham, operated one himself, and succeeded in catching five fish only. But no testimony can be found in the record of any set net location being rented on any terms on the lower Columbia River.

The only evidence offered on this theory was taken before the special master. The appellees called as witnesses there: Frank Woodfield, Amon Markham, Ralph Grable, Moses Hirschey, and appellee H. S. McGowan.

FRANK WOODFIELD.

This witness neither testified nor was he interrogated upon this subject.

AMON MARKHAM.

The testimony of this witness covers pages 460

to 494, Transcript of Record. We cannot hope to incorporate it all here.

This witness testified that he had been engaged in fishing on the Columbia River for about 34 years, with the exception of four years, when he was deputy sheriff of Pacific County, Washington.

On page 462, this witness gives his judgment of the number of fish he could have caught, had he the exclusive right to operate all of appellees' set nets on their locations—35 tons.

By skillful and leading questions, he was later, and on page 465, led to say, if he could have the right to operate 18 to 36 set nets there, then he could catch almost as many fish as a drag seine. Later on, he guaranteed he could do so.

On page 466, he testified that he had operated set nets in the Columbia River.

On cross examination, however, pages 469, 470, his numerous set nets dwindled down to one, which he operated opposite Sand Island, in the Oklahoma channel, and he only caught 5 fish.

He also testifed that he had heard of three gentlemen who operated set nets off the south shore of Sand Island. He did not know their names.

He also testified that he never saw a set net in front of the south shore of the island, excepting the alleged set nets placed there by appellees.

We call the court's attention to the testimony of this witness on page 487. After testifying that he was a fisherman by occupation, living at Ilwaco, Pacific County, Washington, a village of fishermen,

that his associates were all fishermen, and he had followed fishing for 34 years last past, he testified as follows on page 487, Transcript:

Q. Now during that time, how many set nets do you know of, of your own personal knowledge, not what you have heard, were operated on the lower Columbia River?

A. On the lower Columbia River?

Q. Yes.

A. Why I don't know. There is a question I won't answer, because I don't know.

Q. Can you recall one?

A. No, I would not answer that—only one of my own—I have operated a set net a few days during the early spring, that is all.

Q. Just a few days?

A. Yes sir, I would not tell you something I do not know.

This witness, according to his own sworn testimony, had operated but one set net in the waters of the Columbia River, and then only for a very few days, and in which he caught five fish, and quit because it was a failure. And this set net was operated in front but on the west side of Sand Island.

He testified that he had never seen any set nets operated on appellees' alleged locations. He said he had heard of some being operated there, but did not know by who, or whether any fish were caught therein. He evidently had reference to the efforts of appellees.

We know of no principle of law or evidence

which would permit this witness to give his opinion as to the number of fish that set nets could catch if operated there. He was not an expert in that line, had no experience whatever.

The evidence of this witness may be searched in vain for any expression of opinion as to custom.

He was asked, page 469, if he knew what the value of fishing locations are for rental purposes, to which he answered 33-1-3 per cent. We objected to this question and answer, and questioned this witness as to his qualifications, as follows: (page 470)

Q. Do you know of any set net sites being rented on the Columbia River?

A. I do.

Q. Where? * * * I am talking about set nets, Mr. Markham. Please keep in mind set nets. * * * Do you know of any man renting or paying anything for the purpose of operating a set net on the Columbia River?

A. Yes, sir, I have.

Q. Who?

A. I can show you.

Q. I said who?

A. Mr. Brown for one.

Q. Who did he rent from?

A. I don't know. Mr. Firberg, I believe.

Q. He rented a set net location from Firberg?

A. Yes, sir.

Q. Where?

A. I don't know.

Q. That was about 1860 or 70?

A. In all probability, it was.

This witness, of course, was incompetent. But he, nevertheless, testified that it was a **rule** on the Columbia River to pay to the owner one-third of the fish caught, and if rentor furnished all gear, two-thirds of the catch.

This was simply an expression of the opinion of the witness. No facts were testified to, neither did the witness show any knowledge of this alleged rule.

He was not asked, neither did he testify, concerning a custom. But had he been asked, he certainly was not qualified. Now, he said he had heard of but one man renting a set net location, the location being to him unknown, and during the year 1860 or 1870. Yet, he was glib to testify that it was the rule for fishermen to deliver a certain percentage of fish caught on leased premises to the owner, without regard to the character of the premises. Having neither known, nor heard of any such transaction, it logically follows he could not truthully so testify, and, as a matter of fact, he could not so testify. The witness himself was incompetent. Therefore, it was not from this witness that the findings were based.

RALPH GRABLE.

The testimony of this witness covers pages 494 to 533, Transcript of Record. It was surely not from his testimony that these findings can find support.

This witness resides in Ilwaco, Washington,

and is 34 years of age, and has been engaged in salmon fishing on the Columbia River since he was 15 years old.

On page 496, he says, he never leased any set net locations. The testimony of this witness as to custom is worthless, for he testified to nothing that is competent.

MR. WELSH:

Q. Are you familiar with the custom among fishermen on the Columbia River as to the price that shall be paid for the leasing of fishing locations?

A. I think I am, sir

* * *

Q. What is it?

A. I think that any man that leases ground from another, or the man that furnishes gear for another man to fish within the same as grounds, we consider it that way, the man who furnishes grounds without gear, he is entitled to 33-1-3 per cent.

Q. Of what?

A. Of the gross catch, and the man that furnishes the gear and grounds both, he gets 50 per cent. **That has always been my way of leasing.**

This witness was not interrogated as to whether or not there was any custom in this regard. He was simply asked if he was familiar with a custom. This alleged custom was simply assumed.

But this witness qualified his answer by saying that was always the way he leased fishing grounds, and it must be remembered he never leased or heard

of any one leasing a set net location on the lower Columbia River.

Surely, no lawyer would contend that this was proof of any custom. It could not possibly be from this witness that these findings were predicated.

MOSES HIRSCHEY.

This witness did not testify, nor was he interrogated as to any custom.

H. S. McGOWAN.

The testimony of this witness may be searched in vain for any expression as to any custom.

At page 563, Mr. McGowan testifies as follows:

Mr. WELSH:

Q. Do you know the value of the use and occupation of fishing locations for a year?

A. Yes, generally speaking, I do. Of course, that depends a good deal upon having pretty accurate knowledge of what the location is that is in question.

Q. Now, will you state what it is?

A. The general rule is to this effect, that any **good standard fishery,** I am not talking about any bum fishery. I am talking about a good **standard fishery.** That one-third of the gross catch goes to the owner of the fishery, provided that the man that leases from him and operates it furnishes everything, but if the man that owns the fishery rights furnishes the outfit and gear and all that, and the other fellow carries it on, there is a square division of half and half.

Q. Do you know the market value of this leasehold or rental?

A. Well, the market value is according to the rule I have just told you, would be one-third of the gross catch.

This witness further says, that this rule would in his opinion apply to the locations in controversy.

Now, this witness testified that he thought the appellees with their 8 set nets could and would have caught about two-thirds as many fish as were caught by appellant in its numerous seines.

This witness testifies that he had operated on the locations in question 3 out of 8 of the set net locations for a week or ten days—he could not remember—but they might have been operated two weeks, yet not one fish was the result of these two weeks of effort. It does not require any great knowledge of mathematics or much time to compute the number of fish that could have been caught on these locations during the season. These were the only set nets ever operated on these grounds, and this witness says they were shifted from one position to another, covering the entire territory. Yet, the result, nil.

In the face of such facts, in the face of this evidence, the court below found that these same nets would have caught during that season 150 tons of fish.

The findings as regard to custom could not have been predicated upon any evidence given by this witness.

ERICK LINDSTROM.

This witness did not testify as to any custom. This witness was asked, if he knew of any rule as to prices paid for leasing fishing grounds. He testified he had never leased any himself. But P. J. McGowan and Sons had leased grounds on the upper river by giving one-half of the catch for the lease.

This witness nowhere says he has any knowledge of any rule, but explains certain personal transactions which had come, in some manner, to his knowledge. But this witness did not at any time say that he had knowledge of any rule. The only experience he had was in regard to a set net on the upper Columbia River which his brother leased from P. J. McGowan and Sons. This was all he knew about this alleged rule.

This witness gives it as his opinion that had he alone been permitted to operate his set nets, he would have caught 600 tons of fish during the year 1908, and, consequently, the rental value of his 3 set net locations, in his judgment, for that year was $26,000.00.

This statement was made in face of the fact that he had operated three set nets on these grounds from ten days to two weeks, and had not caught a single fish.

It was not from this witness that these findings were based, yet they are the only witnesses who gave evidence, or were interrogated, on this subject.

XI.

FINDING NO. III.

"The defendants and cross-complainants, up to the time of the interlocutory decree herein, had by the restraining order issued in this case and had by the act of the plaintifff, been deprived of their fishing locations and of the use of their set nets therein during the entire time of four fishing seasons, viz.: the fishing seasons of the years 1908, 1909, 1910 and 1911."

This finding is simply in line with findings No. I and II—in fact, is no finding of any fact in issue.

XII.

FINDING NO. IV.

"During the entire time of the four fishing seasons mentioned in finding of fact number three (3), the plaintiff occupied the defendants' fishing locations and operated drag seines thereon for the purpose of catching salmon and did catch large amounts of salmon each season, the amount of catch being as follows:

In the year 1908, 150 tons.
In the year 1909, 104 tons.
In the year 1910, 135 tons.
In the year 1911, 390 tons.
Total for four years, 779 tons."

This finding is erroneous and misleading.

As a matter of fact, appellant did not occupy appellees' alleged fishing locations, or any part of either. As a matter of fact, appellant did not fish

appellees' alleged locations, and there is absolutely no evidence to the effect that appellant did. The undisputed evidence shows that appellant did not. Furthermore, the catch of salmon made by appellant covered a territory many thousand times greater than that occupied by appellees' set nets. All that appellant did was:

(a) Engaged in the business of drawing seines in the waters of said river in front of Sites 2 and 3, Sand Island, and landing same upon the shore of the island.

Appellant neither occupied nor fished appellees' alleged locations.

It is true that possibly many times appellant floated and drew seines over these alleged locations, but as to occupying or fishing either, it did not. Appellees had the same right to fish such grounds as appellant, and could have fished them the same way. The injunction was not intended to and did not prevent appellees from fishing said waters. All that appellant asked or obtained was an injunction during the term of its lease, and then only against maintaining fixed structures in the bed of the navigable waters fronting said sites.

Although if it be substantially true that appellant did catch the number of fish found by this finding, we submit it is wholly immaterial and furnishes an erroneous basis for determining appellees measure of damages.

We believe this is easily demonstrated. Every witness that appellant called in this case, who gave

his opinion as to the number of fish that he thought could have been caught in appellees' set nets, if fished, was forced to admit that the only set nets that had ever been operated in front of these sites, or in that vicinity, were three in number, and were those operated by appellees. And if the testimony of appellees is to be credited at all, these three nets were operated from the first part of May to June 21, 1908, and they did not catch a single fish. Mr. McGowan thinks some fish were caught and stolen. This is the wildest conjecture. No fish was taken by any one, none were seen in the nets. Beyond this, these grounds were never fished with a set net, or any appliance, excepting, of course, drift nets and seines were at times hauled thereover. But in all the history of the fishing industry, no set net had ever been operated there, or in that neighborhood, unless you consider the one operated by witness Markham in the Oklahoma channel, and he caught five fish—not enough to pay expenses—and some little play fishing related by witness Grable.

Therefore, there was absolutely no standard upon which any one could base an opinion otner than fish could not be taken there by such appliances. No human being had ever caught any fish by any such process there. In fact, set net fishing had never been employed in the lower Columbia River. Now, upon what fact could any one base an opinion upon which he could give legal evidence? The witnesses were without experience in that line. This method had never been tried by any person.

The whole proposition, to express it mildly, was an experiment pure and simple. This case has no parallel with the case of Pacific Steam Whaling Co. v. Alaska Packers Association, 72 Pac. 161-5.

In that case, the identical appliances had been in long use on the identical grounds, so that the reasonable return of each fish boat was a matter that could be and was in that case accurately estimated. No such state of facts exist here. The appliances sought to be used here had never been used before, except with a total failure.

Furthermore, seines and set nets are operated upon entirely different principles, and are dissimilar in every respect. The seines cover square acres where the set nets cover square feet. But the entire recklessness of this finding, and the total disregard of the lower court of appellant's rights is shown by this finding, for appellees only claim set nets in front of Sites 2 and 3. Now, the evidence shows that appellant's lease upon which it bases this right expired March 28, 1911. The evidence also shows that prior to April 1, 1911, advertisement was again made to lease all the sites on Sand Island, and that appellant secured a lease for Sites 1, 2 and 3 thereon, beginning April 1, 1911, and fished them all in August, 1911, catching 390 tons of fish. The court gave appellees one-third of these fish. If appellant had by chance been lessor of the whole island, and been fortunate enough to have caught 1200 tons of fish, doubtless appellees would have been given one-third of all these fish. But, be

that as it may, there is absolutely no evidence that the fish caught by appellant were caught on territory occupied by appellees' alleged set net locations.

XIII.

FINDING NO. V.

"The set nets which the defendants would have operated upon said fishing locations had they not been prevented by plaintiff from occupying the locations would have caught two-thirds as many fish and two-thirds as much in quantity each year as were caught by the plaintiff's drag seines. that is to say, two-thirds of 779 tons, the amount shown by finding of fact number four (4) as actually caught by the drag seines, making 518 tons which defendants' set nets would have caught during the four fishing seasons."

LAWS OF OREGON AS TO SET NETS ON THE COLUMBIA RIVER.

Nothing could be more erroneous and absurd than findings No. IV and V, when considered in the light of the laws of Oregon existing during the period in question.

It must be remembered that the Supreme Court of the United States announced its decision in the suit brought by the State of Washington against the State of Oregon, wherein it was determined that the boundary line between these states was north of Sand Island, on the 16th day of November, 1908.

It was then known to the world that Sand Is-

land was in Oregon, and that Washington had no jurisdiction thereover.

Now, under the laws of Oregon, existing during the years 1908, 1909, 1910 and 1911, there were no restrictions whatever as to distances between set nets in Oregon pertaining to the Columbia River, or set net locations. Under the law then existing on the Columbia River, a set net could be placed any distance one desired from another. Therefore, the appellees had but eight licenses. The sites 2 and 3 had a frontage of 7,000 feet (see Plaintiff's Exhibit "E", page 724, Transcript of Record). Every foot of this territory could have been during that whole period legally occupied with set nets. The set net locations of appellees, if legal at all, occupied only the actual ground upon which they were constructed. There was no end or latteral passageway provided by law in Oregon as to set nets in such river. To hold under such circumstances that appellees were entitled to all fish caught in the vast space in front of such sites is simply absurd. Furthermore, to hold that the measure of appellees' damages for being deprived of their right to maintain eight set nets there was two-thirds of the number of fish taken by appellant, whose seines swept the whole of that territory clear into the deep navigable channel of the river is nothing more or less than judicial robbery. It can find support neither in law, equity or fact.

XIV.

FINDINGS NO. VI and VII.

VI.

"I find that by reason of the foregoing facts the defendants were in the position of forced lessors of the locations in question, inasmuch as they owned them and were entitled to them, but the plaintiff, through its own act and through the aid of the restraining order heretofore mentioned, occupied and fished them and appropriated the entire output to its own use, and defendants were therefore in position of lessors furnishing the location without furnishing fishing gear, and they were therefore entitled to one-third of the gross catch of what their set nets would have caught upon said locations, that is to say, one-third of 518 tons, being 172 tons."

XV.

FINDING NO. VII.

"As set forth in finding of fact No. 6, the amount of fish to which defendants were entitled as the rent for the four seasons was in the aggregate, 172 tons, and I find that the average price of fish for the four seasons was $130.00 per ton, and the 172 tons of fish were of the value of $22,360.00."

These findings, excepting as to the value of the fish caught, are on the same theory as the previous findings, which we have heretofore discussed.

XVI.

AVERAGE PRICE OF FISH.

The master found that the average price of fish

during the four seasons was $130.00 per ton. This finding was modified by the court below in this: The lower court found that the average price for fish for 1908 was $120.00 per ton; for 1909, $125.00 per ton; and for 1910 and 1911, $130.00 per ton, from which the learned lower court found that the value of the 172 tons of fish, which according to the alleged custom appellees were entitled to receive as rental for their alleged set net locations, was $22,083.00 Just how the learned court arrived at these figures, we are unable to comprehend, unless an error was made in calculation. According to findings of fact No. IV and V, the basis of appellees' damages was the amount of fish caught by appellant during the years 1908, 1909, 1910 and 1911, as follows:

1908—150 tons
1909—104 tons
1910—130 tons
1911—390 tons

———

Total 779 tons

Taking the above as a basis, the court found that appellees' set nets, if operated during said year, would have caught each year two-thirds of the total caught by appellant, namely:

1908—100 tons
1909—69.33 tons
1910—90 tons
1911—260 tons, which the court found to be a total of 518 tons.

The lower court further found that the meas-

ure of appellees' damages was the value of one-third of such estimated catch, namely:

1908, estimated catch 100 tons, 1-3 amount 33.33 tons valued at $120.00 amount	$ 4000.00
1909, estimated catch 69.33 tons, 1-3 amount 23.1 tons valued at $125.00 amount	2887.50
1910, estimated catch 90 tons 1-3 amount 30 tons valued at $130.00 amount	3900.00
1911, estimated catch 260 tons 1-3 amount 86.66 tons valued at $130.00 amount	11266.60
Total amount	$22,054.10

We have given appellees by these figures almost a ton more fish than the court found as rental, yet the amount is $28.90 less than the judgment entered against appellant. We cannot reconcile the judgment with the findings, nor the findings with the judgment.

XVII.

FINDING NO. VII.

"The defendants and cross-complainants were equally interested in the said fishing locations."

This is a remarkable finding—remarkable in that we find no evidence to support it in the record, and, if true, remarkable in that each appellee was clearly violating the laws of Washington.

Sec. 5187, Remington & Ballinger's Annotated Codes and Statutes of Washington, Session Laws of 1907, pg. 681, provides as follows:

"No more than three licenses shall be issued to any one person, firm or corporation."

If this finding is true, then H. S. McGowan, a canneryman, not only owns two set net licenses issued to him by Washington, but is equally interested with J. P. Coyle in three more, and with Erick Lindstrom with three more, making the modest total of eight fishing licenses and fishing locations in which he owns an undivided interest. Both Lindstrom and Coyle owned the same number. This is the character of ownership the legislature of Washington desired to prohibit. Here are violators of the law, each urging a cause of action for damages for being prevented from violating the laws of both Washington and Oregon. Strange to say, they discovered a forum which granted them damages therefor. We know of no legal principle which admits of any one to enforce a claim for damages based upon acts prohibited by law. If such is the law, then a burglar undoubtedly has an action against the owner for preventing him from burglarizing the owner's house. His measure of damages would be the value of the lot he would have obtained had he not been interfered with.

XVIII.

CONCLUSIONS OF LAW.

The conclusions of law are based upon these findings.

We have discussed the findings, and what we have said in regard thereto applies equally to the conclusions of law and need not be repeated.

XIX.

THE APPELLANT FILED A MOTION REQUESTING THIS COURT TO DISMISS THIS SUIT ON JUNE 4, 1909. THEREFORE, APPELLEES CANNOT UPON ANY THEORY CLAIM DAMAGES OCCURRING AFTER THAT DATE.

This suit was brought in the court below under the mistaken belief that Sand Island was within the territorial boundaries of Washngton.

Shortly after the decree of the Supreme Court of the United States, in Washington v. Oregon, was handed down, and on June 4, 1909, appellant filed a motion in the court below, praying the court to dismiss this case. Pages 126-7-8-9, Transcript of Record. This motion was based upon the ground that the court had no jurisdiction of the cause of action, a proposition which we have heretofore discussed. The appellees denied this motion. It was submitted to His Honor Judge Donworth, and was by him overruled. The appellant has been forced by appellees to maintain this suit, as well as the preliminary injunction. It had been appellant's contention ever since the decision was handed down in the boundary suit between Washington and Oregon, that the court below had no jurisdiction of this suit, and had been trying its very best to quit. But appellees forced it to keep the suit; have forced appellant to maintain its injunction; and now contend that they are entitled to damages during the years that appellant had been forcibly held in the court below .

To make this matter clearer, appellant, on September 5, 1910, filed in the court below its supplemental complaint (pg. 149, Transcript), in which it alleged that the court below was without jurisdiction and prayed for a dismissal of this suit, but appellees filed an answer insisting upon the court below retaining jurisdiction, with the result that this suit was retained.

The only theory upon which appellees resisted appellant's efforts to have this case dismissed, was that they had filed their cross bills; otherwise, our motion to dimiss would have been sustained.

Therefore, the only purpose for which this case was retained in the court below was upon appellees' cross bills, and then only as to damages to date of filing same. They cannot recover on these cross bills any damages sustained after filing same. This is fundamental law. Had appellees permitted a dismissal of this suit when appellant filed its motion therefor, then damages would have ceased. Upon what theory can it be held that appellees are entitled to the enormous damages under this state of facts?

XX.

APPELLEES HAD NEITHER LOCATION NOR LICENSE.

In this connection, we again repeat, that the only theory upon which the appellees kept the appellant in court and prevented it from dismissing this suit was upon the counterclaim which they separately filed. It is by virtue of the facts set forth in this

counterclaim that the court held, as we understood it, that appellant could not dismiss this suit.

An investigation of these cross bills will show that neither of the appellees ever had a set net location in front of either of said two sites in question. Each of the appellees plead that he is entitled to operate his set nets in front of these premiss by virtue of a license issued to him by the **Fish Commissioner of the State of Washington**, and that by virtue of such set net licenses, he selected and marked out the locations which he claims in this suit.

The appellees plant their entire defense and their sole claim to these locations upon the licenses issued to them by the Fish Commissioner of the State of Washington.

There is absolutely no contention found anywhere in the record that either of the locations in question were taken under any Oregon license, or that the laws of Oregon pertaining to set net locations were ever attempted to be complied with.

We have here a case where the appellees, citizens of the State of Washington, have come into the State of Oregon, armed with a license issued by the officials of the State of Washington to operate and maintain set nets within the territorial boundaries of the State of Washington, and with these licenses, set net locations were attempted within the territorial boundaries of the State of Oregon according to the laws of the State of Washington, and in violation of the laws of the State of Oregon. Every day that the appellees were operating these set net lo-

cations, they were violating the criminal laws of the State of Oregon, Secs., 5294-5298a-5321, Lord's Oregon Laws. Under the laws of the State of Oregon, the appellees were not permitted to operate these set nets, and could have been prosecuted and punished for every day they were operated, and the set nets could have been confiscated.

Section 5304, Lord's Oregon Laws, reads as follows:

"Any person having obtained a license from the fish warden to operate a set net shall cause to be placed and maintained on a substantial post or monument erected for that purpose on the bank of the river or channel, or on a buoy securely anchored on the location claimed, the number preceded by an "O" designated by the fsh warden at the time of issuing such license, said number to consist of black figures not less than six inches in length painted on white ground. In addition thereto said person shall cause to be branded on the corks of each end of said set net and upon the cork nearest the center thereof the number designated in said license, said number to consist of figures not less than one inch in length."

In the face of the foregoing statutory provision, how can it be successfully contended that either of the appellees ever had any set net location whatever, or had any right to operate set nets in front of such sites? Not having a license to operate set nets, they gained no legal status in attempting to make loca-

tions. Having no legal or equitable rights, they were deprived of none by the injunction.

Appellees cannot escape the above conclusion by claiming that H. S. McGowan subsequently acquired licenses from the fish warden of Oregon for the all-sufficient reason no location was attempted thereunder.

On page 259, Mr. McGowan testifies that there were issued to him 2 set net licenses, 3 to Coyle and 3 to Lindstrom, all dated April 15, 1908. These licenses he produced and said—

"We all located these set net licenses on the fishing grounds on the 16th day of June, 1908 and were located by anchoring buoys at each end of the ground covered by each license and fastening the license number to the buoys. The buoys were held in place by means of stone anchors, that is they were stones with holes drilled in; stones probably weighing 300 pounds, and through the holes in the stones wire cables were put and clamped on; wire cable probably 20 or 25 feet long, or 30, and on the other end of the wire cable were fastened suitable cedar buoys, probably four feet long, and about eight or ten inches in diameter, and on these buoys were fastened the license numbers. These license numbers were in black figures on light background; the figures were about seven inches long. There were two buoys to each location and these buoys were located, of course, at the place we intended to occupy for our set nets. All of these buoys were handled in the same manner, and the licenses for each of said sites

were attached as I have heretofore indicated. We were working together to a large extent. I know that this was the customary method of anchoring set nets and it was the only practical method, and I was intending in good faith to occupy these locations with set nets and I obtained these licenses for that purpose. The reason I did not obtain licenses from the State of Oregon was that the property was within the State of Washington and the rights were in the State of Washington so far as I know. That was the general understanding. Everybody acted upon that assumption, both private individuals and public officials. I did, however, obtain four licenses from the State of Oregon, and I have these with me. They are numbered O-142, O-143, O-144, O-145. I got them simply so that there would not be any question as to our right in the State of Washington or the State of Oregon in operating my fishing rights on Sand Island. I knew that there was a controversy existing between these two states over the boundary line and I obtained these licenses accordingly as a protection so that I would have licenses from which ever state that should prevail. These licenses were issued to me on the dates they purport to bear, and I have never transferred them. I had these Oregon licenses merely to protect my rights in fishing there the best I knew how. After the defendants Lindstrom and Coyle and myself had anchored the buoys, I have just mentioned, I received a call from Mr. Bagnall, Assistant United States Engineer of the Columbia River District, and he informed me that

he was investigating a complaint that had been made against me for obstructing navigation.

All of our set net locations were below and beyond low tide, probably 50 to a 100 feet below the line of low-water mark, extending out into the stream and none were above the line of low tide. We also had a drag seine license for that location that year. It was issued April 1, 1908, and this license was posted on the premises on a board with black letters or figures on a white or light ground, nailed upon a post at each end of the location. The number of that license was 726, issued by the Fish Commissioner of the State of Washington. I had this license at the same place I had posted our former seining licenses on the same premises. There was a post driven in the ground standing up probably five or six feet above the surface. The license numbers were painted on a board or boards in black letters about ten inches long, on a white or light colored ground, and these boards containing the license numbers were then nailed upon this stake in a conspicuous manner. This license number, 726, was placed there immediately after the license was received. It was not issued until the first of April and probably was not received from the Fish Commissioner for a day or two afterward. It was posted, however, during the month of April, 1908. I took a photograph of that monument which marked my drag seine license. I cannot give the exact date it was taken, but it was subsequent to April 1, 1908. I took the picture myself. There are a number of boards nailed

to the same post other than the one that carries the number of this 1908 license.

These are the licenses of the previous years. The license number did not show very plainly. The weather had beaten the lettering off so that it was indistinct unless you get close up, but the number 726 appears prominently.

MR. DOOR: The license that the witness is testifying about, which is 726, bears the date of April 1, 1908, and is purported to be a license for one year, ending as it is printed in this blank, March 31, 1908. This would be the day before the date that it was issued, which counsel contends at this time is manifestly an error of the expiraton date by the issuing office. We may have to ask some indulgence to prove that if any objection is made against it.

MR. FULTON: I will stipulate that this was a mistake in the date; that the date should end on March 31, 1909."

Again on page 287, Mr. McGowan testifies as follows:

"The Oregon licenses were not used because of the general understanding that the territory was within Washington."

Again on pages 288 and 289, this same witness testifies that he had no Oregon licenses for either the year 1909, 1910 or 1911.

XXI.

THE EVIDENCE.

In our judgment, there is no evidence of ac-

tual damages suffered by appellees in this record. On the contrary, the evidence overwhelmingly shows:

FIRST: That appellee H. S. McGowan induced the other appellees to act in concert with him in placing these obstructions under the name of set nets in front of said sites, for the sole purpose of harassing any annoying appellant and preventing it from employing its premises in landing seines thereon, and without any intention whatever of operating any set net on any point thereon.

SECOND: That the said alleged locations were valueless for set net purposes.

THIRD: That it was a physical impossibility to either maintain a set net on either of said alleged locations, or to catch any fish, if operated, for three reasons.

(1) That the grounds were wholly unsuited for the operation of set nets.

(2) That the current was too swift and strong to possibly maintain a set net there, and

(3) That each of said locations were squarely on the main drifting grounds used and employed by gill net fishermen and would have been destroyed by them.

Conceding for the sake of the propositions under consideration that appellees had the right to deprive appellant of its frontage, and its ingress to and egress from its permises, and that appellant by injunction deprived appellees of the use thereof, the appellees can recover only such actual damages, if

any they actually sustained, and which the evidence shows they sustained, if any.

If the evidence fails to show actual damages, then nominal damages are alone recoverable.

The only evidence which appellees offered as to their damages, was the opinion of themselves and two other witnesses, namely, Amon Markham and Ralph Grable, that had these set nets been operated many tons of fish might have been caught therein. We have had occasion to remark that neither of these witnesses had ever tried these grounds, or operated a set net in such waters, the evidence showing that such methods had never been employed by fishermen on the lower Columbia River. (See Evidence, H. S. McGowan, pg. 303, Transcript). No other witness on behalf of appellees gave any evidence on this question.

Moses Hirschey, a witness on appellees' behalf, an expert fisherman, was asked by council for appellees (pg. 540, transcript) what he thought about these locations for set net purposes. But he declined to express an opinion, because he had never tried it, and knew nothing about set nets.

Against the opinionated evidence of the appellees and these two witnesses, appellant called an array of disinterested fishermen, men engagd in and who had been engaged in operating set nets for catching salmon fish for many years on the Columbia River namely:

C. Hansen, Jr., Jens Neilson, Capt. John Ostervold, M. Lugnet, Ole J. Settem, R. A. Hawkins, W.

A. Latourell, H. R. Reed, E. Polson, H. M. Lorentsen, T. K. Johnson and T. M. Nelson.

These witnesses were wholly disinterested. None were in the employ of appellant, excepting only R. A. Hawkins, and each was, and for many years had been, familiar with set nets, and their operation, character of water and places where they could be practically employed, and each stated that set nets could not be operated on these locations, and such locations were valueless for set net locations.

Yet, the court below disregarded the sworn testimony of all these witnesses, and found in favor of two witnesses, who had no experience, and more than that, adopted an erroneous rule for the measure of appellees' damages.

XXII.

APPELLEES' PURPOSE.

We have ever contended that it never was the intention of appellees to operate any set net on these alleged locations. That these obstructions, under the guise of set net locations, were placed in front of said sites for the sole purpose of injuring, harassing and annoying appellant.

The evidence shows that appellee McGowan is the only interested one. The other two appellees are his employes, they have never been called upon to advance either labor or money, and neither knows anything about what costs McGowan has been put to.

The evidence shows, that Mr. McGowan fish-

ed one of these sites before the government leased same, and after the government concluded to lease same, McGowan was the successful bidder for the three years beginning in 1905. He operated no set nets there; on the contrary, he operated seines, and no one interrupted him, but in 1908, bids were again called for, and appellant was the successful bidder. McGowan was angry because of this, and he seemed obsessed with the idea that he was the owner of this site, and immediately adopted these means in retaliation of his misconceived grievances.

The evidence of McGowan and the other appellees shows that these obstructions placed in front of these sites, under the cunning guise of set net locations, were placed there for the sole purpose of prohibiting appellant from operating seines and not to catch fish.

This brief is already too long, but before closing we cannot refrain from calling the court's attention to the unreasonableness, if not utter falsity, in the testimony of the appellant and their two witnesses.

As we have stated, the evidence shows that the appellee McGowan had operated these identical sites for many years prior to 1908 and he had during that time employed the same exclusively in operating seines.

It is not contended in this case that the appellant here was at all extravagant in conducting its seining operations on these grounds.

We call the court's attention to page 210, Tran-

script of Evidence, from which it appears that it cost the appellant at least $15,000.00 to put its seining outfit alone on these grounds, and it had expended that sum of money by the 2nd day of July, 1908, when it began its seining operations. It had 6 seining boats, 2 launches, scows, cooking utensils, barns for its horses, and it had 24 horses and employed 48 men. It is not difficult to estimate the cost of operating these seines on these grounds.

It is fair to assume that Mr. McGowan had a crew of equal size, and was required to expend equally as much money whilst he operated the same ground. Now, turn to the testimony of Mr. McGowan. He testifies that in his opinion had he been permitted to operate these 8 set nets on these grounds, he could have caught practically as many fish as the seines. His estimate was that he would have caught at least two-thirds as many, and he stated the total expense per year to have been only $2,000.00. But Mr. McGowan's estimate of the number of fish that he could have caught in these eight set net locations was 150 tons of salmon fish each year, without paying one cent rental, and valued at $120.00 per ton equals $18,000.00, less the expense of operation $2,000.00, leaving him a clear profit of $16,000.00, but when fish were selling at $130.00 per ton, a profit of $17,500.00. This is McGowan's sworn statement. Now, mark the bid he made for a lease for these sites, when the procurement of such lease would have given him not only these set net locations, but the shore also. His bid was to use his

own language (pg. 294, Transcript), "I do not recollect, but it might have been in the neighborhood of $1,000.00." In the face of this testimony, can this court place any reliance upon this estimated catch, so much relied upon by the appellees.

Furthermore, is it conceivable that any sane person would go to the enormous expense of purchasing and operating seines, employing a large number of men, the initial expense being little short of $15,000.00, and the daily expense running into the hundred of dollars, when he could have caught the same fish at an initial expenditure of not to exceed $650.00, and a total expenditure for operating expenses of $2,100.00, and a grand total of not to exceed $3,000.00? Can the bid made by Mr. McGowan be reconciled upon any principle of common honesty, with his opinion and evidence of the catch of fish by these alleged set net locations?

XXIII.

CONCLUSION.

In conclusion, we respectfully submit—

FIRST: That the court had no jurisdiction over the cause of action set forth in the complaint, and surely no jurisdicton over the matters, or cause of action set forth in the separate answers and cross bills of the appellees.

SECOND: That the question of concurrent jurisdiction is not, and cannot be involved in this suit, for the reason that Oregon and Washington have not passed concurring laws in regard to set nets.

THIRD: That under the laws of Oregon, as determined by its Supreme Court, Eagle Cliff Fishing Co. v. McGowan, et al., supra., the appellant, as lessee of the United States of Sites 2 and 3 and appurtenances thereto, was entitled of right to have its entire frontage between its shore and the navigable waters, clear and free of all obstructions, so that it could, without interference of any fixed structure haul its seines upon its shore and land them therefrom, and that under the provisions of the Constitution of Oregon, as construed by the courts of such state, the placing and maintaining of the set nets complained of here was unlawful, in that it in effect vested in appellees a private fishery.

FOURTH: The pleadings and also the evidence show that neither of the appellees had a set net location. They could not obtain a set net location in Oregon, unless they first complied with the laws of Oregon, which they did not do, and their defense is based entirely and exclusively upon licenses issued by the State of Washington and locations made thereunder.

FIFTH: In any event, the appellees can recover no damages beyond the first year, namely, during the year 1908, because of the fact that before the beginning of the fishing season of 1909, appellant filed a motion to dismiss this case, on the ground that this court had no jurisdiction. The appellees resisted this motion, and, at their request, the court below retained jurisdiction.

SIXTH: Under the evidence in this case un-

der any construction, the appellees can only recover nominal damages. There is absolutely no competent evidence on the part of appellees of the value of the use of either of these alleged set net locations, and the attempt to prove value by an alleged custom wholly failed, for the reason that there is no evidence of such alleged or any custom.

Respectfully submitted,

G. C. FULTON,

Solicitor for Appellant.

ADDENDA.

The following is a copy of the Act of the Legislative Assembly of the state of Oregon, granting to the United States all tide lands bordering upon and adjacent to Sand Island.

AN ACT

To grant to the United States all right and interest of the State of Oregon to certain tide lands herein mentioned.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF OREGON:

Sec. 1. There is hereby granted to the United States, all right and interest of the State of Oregon in and to the land in front of Fort Stevens, and Point Adams, situated in this state, and subject to overflow between high and low tide, and also to Sand Island situate at the mouth of the Columbia river in this state; the said Island being subject to overflow between high and low tide.

Sec. 2. The Governor of this state shall cause two copies of this act to be prepared and certified under the seal of this state, and forward one of such

copies to the Secretary of War of the United States, and the other of such copies to the commanding officer of this district of the military department of the Pacific Coast.

Passed the House Oct. 19th, 1864.
I. R. MOORES,
Speaker of the House of Representatives.

Passed the Senate October 20th, 1864.
J. H. MITCHELL,
President of the Senate.

Approved October 21st A. D. 1864.
ADDISON C. GIBBS,
Governor of Oregon.

Endorsed: H. B. No. 65.